

1 UNITED STATES DISTRICT COURT

2 SOUTHERN DISTRICT OF TEXAS

3 THE HONORABLE ANDREW S. HANEN, JUDGE PRESIDING

4 UNITED STATES OF AMERICA,) No. 4:22-cr-612
5 Plaintiff,)
6 vs.)
7 EDWARD CONSTANTINESCU,)
et al.,)
8 Defendants.)

10 PRETRIAL CONFERENCE - DAY 1

11 OFFICIAL COURT REPORTER'S CERTIFIED TRANSCRIPT

12 Houston, Texas

13 March 19, 2024

15 APPEARANCES:

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4 Southern District of Texas

6 **Proceedings recorded by mechanical stenography.**
7 **Transcript produced by Reporter on computer.**

PROCEEDINGS

(The following proceedings held in open court.)

* * *

THE COURT: Thank you. Be seated. All right. Let me start off by doing kind of a little calendar so you know what has happened.

As we discussed, we sent out that initial short questionnaire. We've gotten multiple responses back. I have excused some people, not excused people. I mean, it was like somebody wrote back and said I can't hear, you know, I figure, well, none of us want a juror that can't hear. Things of that nature.

On the 27th, which, if my memory is right is a week from Wednesday, so a week from tomorrow, the jurors are going to come in and answer the long questionnaire. Those will be reduced to a disk and you can pick up that disk on the afternoon of the 28th.

And, Rhonda, do they pick it up from you or from the clerk's office?

THE CASE MANAGER: From the clerk's office.

THE COURT: And you'll have to sign for

09:14:02 1 it. And you'll have to return the disk after jury
09:14:04 2 selection. That disk is your copy of the
09:14:11 3 questionnaires. You will not get paper
09:14:14 4 questionnaires. So, I mean, you're in charge of
09:14:17 5 downloading it in whatever form you want it.

09:14:22 6 And then after jury selection's done,
09:14:25 7 you'll have to give it back to Rhonda.

09:14:29 8 Then jury selection will be Monday,
09:14:36 9 April 1st. I want the attorneys and the parties to
09:14:40 10 report here, say, at 9:30. By "here" I mean, this
09:14:50 11 courtroom. That's because they're going to assemble
09:14:53 12 the jurors, the panel, up in Judge Hoyt's courtroom
09:14:57 13 where we're actually going to be doing the jury
09:15:04 14 selection.

09:15:06 15 And there'll just be too much confusion if
09:15:09 16 we have lawyers and clients and family members up
09:15:12 17 there in the middle of the jurors. So I want you to
09:15:15 18 report here. And then once they get situated up
09:15:19 19 there, then we'll all go up there.

09:15:28 20 I have some -- a joint -- defendants'
09:15:32 21 joint proposed voir dire, giving me suggestions about
09:15:35 22 what to ask. I don't know that I have one from the
09:15:38 23 government. But if you want me to consider certain
09:15:44 24 questions, government, you need to get them to me this
09:15:45 25 week.

09:15:48 1 We are going to call the people coming in
09:15:56 2 Wednesday, a week from tomorrow, somewhere between 150
09:16:03 3 and 175. The courtroom upstairs can actually sit
09:16:08 4 about 160. And that's where we're -- that's the
09:16:18 5 number we'll probably be working with. I told them if
09:16:23 6 they have a couple extra jurors and we have room for
09:16:26 7 them, we'll take them.

09:16:33 8 Other than that, let me go to -- I got a
09:16:46 9 letter from Mr. Williams generally outlining a
09:16:55 10 presentation. Opening statements, Mr. Williams was
09:17:00 11 suggesting 30 minutes a side. I will probably not do
09:17:05 12 that. I will probably limit the defendants' to 30
09:17:07 13 minutes and give the government a little more time
09:17:09 14 because there is one of them and seven of y'all. But
09:17:14 15 not substantially more.

09:17:16 16 Mr. Williams suggested presentation of
09:17:21 17 evidence 9:00 to 4:30. I can promise you I will not
09:17:27 18 do that. We're going to work as long and hard as we
09:17:36 19 can.

09:17:36 20 Now he also suggested Monday through
09:17:38 21 Thursday. And as I mentioned last time, that I am
09:17:41 22 considering not having court on Fridays just to let
09:17:46 23 the jurors have some kind of life. And you guys have
09:17:53 24 other cases that you'd probably like to at least look
09:17:56 25 at the file. I have more than I can say grace over.

09:18:01 1 So I am seriously considering the
09:18:08 2 Friday -- taking off Friday. But I probably will work
09:18:17 3 9:00 till 5:30, 6:00, depending on how we're going and
09:18:21 4 depending on the witness. If we're in the middle of a
09:18:24 5 witness, I'm likely to continue the witness in hopes
09:18:27 6 that we can get that witness done.

09:18:31 7 Mr. Williams next suggested that unless
09:18:37 8 it's time-sensitive, any motions should be heard after
09:18:39 9 the jury recessed. That I will do for sure either at
09:18:44 10 lunch or after the jury is recessed. And if that
09:18:48 11 means we're up here till 7:30 or 8:00, we're up here
09:18:53 12 till 7:30 or 8:00.

09:18:54 13 Mr. Williams has suggested that an
09:19:05 14 objection by one defendant applies to all unless they
09:19:08 15 specifically say otherwise. I'll let the government
09:19:11 16 weigh in on that. I have no problem with that, quite
09:19:17 17 frankly. It would be, at least in my mind, a waste of
09:19:26 18 the jurors' time and the Court's time and y'all's time
09:19:31 19 to have all seven lawyers stand up and object. I
09:19:37 20 mean, it just seems a waste of court time and it will
09:19:46 21 slow things down.

09:19:47 22 Now, Mr. Armstrong, if you want to weigh
09:19:50 23 in on that, I'll listen to the government's --

09:19:51 24 MR. ARMSTRONG: No objection, Your Honor.
09:19:52 25 I think that your idea is spot on. It would be just

09:19:56 1 too burdensome.

09:20:07 2 THE COURT: Okay. He suggests a witness
09:20:08 3 list for the next week be turned over. I am fine with
09:20:14 4 that. And I think it would make things go more
09:20:18 5 quickly. If a week is too burdensome, the next two or
09:20:27 6 three days, surely you know your witnesses for the
09:20:33 7 next two or three days. And I mean, that it'll apply
09:20:36 8 both ways.

09:20:37 9 I mean, it'll apply -- the government will
09:20:39 10 have to give you their witnesses for the next two or
09:20:41 11 three days, and when it's the defense's turn, they're
09:20:45 12 going to have to give the government their witnesses
09:20:47 13 for the next two or three days.

09:20:48 14 But I will -- I might not order it for the
09:20:53 15 week as Mr. Williams suggests, but I will order it in
09:20:57 16 advance. And that will include giving the other side
09:21:03 17 statements if they're entitled to them.

09:21:10 18 Cross-examination. First of all, I'm a
09:21:20 19 one-riot/one-ranger person. I mean, we're not going
09:21:24 20 to have two to three lawyers from the same side
09:21:27 21 cross-examine a witness. I think amongst the
09:21:29 22 defendants, you need to decide who's taking the lead.

09:21:35 23 And I'm not going to order somebody to
09:21:38 24 take the lead, because I don't know whose ox is
09:21:42 25 getting gored the worst. And so I'll let you guys

09:21:46 1 pick who wants to go first.

09:21:52 2 I don't want 10 lawyers standing up and
09:21:56 3 saying, you know, the same question over and over and
09:21:59 4 over again. I mean, there's a lot of times that, you
09:22:02 5 know, if your client's name is not mentioned, you
09:22:06 6 know, if you're on the defense side, that's usually a
09:22:09 7 good sign.

09:22:12 8 But I will leave the defendants to come up
09:22:15 9 with their own order and especially with who is taking
09:22:21 10 the lead.

09:22:23 11 The defense has requested that they may
09:22:31 12 call any witnesses in any order, which I took to mean
09:22:36 13 that I wouldn't just call on Mr. Williams, give us all
09:22:42 14 your witnesses, and then go to the next defendant and
09:22:44 15 give us all your witnesses. I'm fine with that;
09:22:53 16 again, conditioned on the fact that the government is
09:22:54 17 going to know who you're calling. And they're going
09:22:56 18 to be forewarned, just like the defense has been
09:22:58 19 forewarned when the government is putting on their
09:23:00 20 case.

09:23:02 21 So those are kind of general tenets that
09:23:09 22 were raised by that letter. And with those
09:23:17 23 qualifications that I just made, I'm probably going to
09:23:19 24 proceed that way.

09:23:22 25 The next thing I want to talk about, to

09:23:24 1 shift gears, also relates to Mr. Williams, I think.
09:23:42 2 And that is, I was given a list of pending motions.
09:23:50 3 And I do want -- I'm going to go to that list, but I'm
09:23:53 4 going to take them out of order.

09:23:55 5 I want to talk about the second motion to
09:23:59 6 dismiss filed by Rybarczyk that was filed last October
09:24:08 7 maybe. And specifically -- well, Mr. Williams, if you
09:24:22 8 want to summarize your motion instead of having me do
09:24:26 9 it, I'm fine. But I'm really more interested, quite
09:24:30 10 frankly, in the government's reply to it.

09:24:40 11 MR. WILLIAMS: I'm going to allow my
09:24:42 12 colleague, Mr. Rosen, to argue the motion, Your Honor.

09:24:44 13 MR. ARMSTRONG: Just one housekeeping
09:24:50 14 matter, Your Honor. I don't see the presence of
09:24:56 15 Mr. Constantinescu or Mr. Deel. I think this is an
09:24:59 16 important part of trial. And so if they're not going
09:25:00 17 to be here, we would request, for the record, that
09:25:03 18 there be a waiver put on the record.

09:25:04 19 THE COURT: Well, I don't -- I didn't
09:25:07 20 order the defendants to be here today. In fact, I'm
09:25:09 21 okay if the defendants who are here leave.

09:25:12 22 MR. ARMSTRONG: Okay. No problem then.

09:25:14 23 THE COURT: You know, we're going to be
09:25:17 24 talking law stuff and admitting documents and motions
09:25:19 25 in limine. And I don't think the defendants

09:25:21 1 necessarily add anything to that.

09:25:26 2 MR. ARMSTRONG: Thank you.

09:25:28 3 THE COURT: But I won't permit that at
09:25:29 4 trial.

09:25:32 5 All right, Mr. Rosen. Find a microphone.

09:25:38 6 MR. ROSEN: Good morning, Your Honor.

09:26:01 7 Your Honor, our argument in the second
09:26:03 8 motion to dismiss is very straightforward. This is a
09:26:05 9 right to control theory that's under the guise of
09:26:09 10 obtaining money or property, but it's not. It doesn't
09:26:14 11 allege a crime under *Ciminelli*, because the core
09:26:17 12 theory of the government's case is that the victims
09:26:19 13 here were deprived of discretionary economic
09:26:22 14 information. They wanted to know our client's trading
09:26:26 15 habits, and they weren't told that. So they were
09:26:30 16 deprived of that economic information.

09:26:33 17 The government has effectively walked away
09:26:36 18 that our clients deprived victims of money and
09:26:40 19 property. They're not going to prove that our clients
09:26:43 20 caused any effect on share price. They'll not prove
09:26:48 21 and they don't have to prove, according to them, that
09:26:50 22 any victim actually lost money as a result of
09:26:53 23 defendants' actions. It's a right to control the
09:26:57 24 discretionary economic information and they have not
09:27:01 25 yet alleged that or proved that it's -- that that's

09:27:05 1 money or property.

09:27:06 2 And so that's really the core of our case
09:27:11 3 that's been fleshed out, both in the indictment, in
09:27:13 4 the superseding indictment, as well as in all the
09:27:16 5 motion papers that have been filed. And we don't
09:27:19 6 think, based on that, that there is a crime that has
09:27:22 7 been alleged.

09:27:23 8 We also think that, you know, there is an
09:27:26 9 issue of money and property here. To the extent that
09:27:29 10 the government tries to argue that they were obtaining
09:27:31 11 money and property for themselves, that's all well and
09:27:33 12 good. That occurs in every type of transaction.

09:27:37 13 But the point being under the "Bridgegate"
09:27:40 14 case and under *Kelly*, it has to be money or property
09:27:43 15 from a victim. And that's what the core is. They
09:27:47 16 have failed to both allege and they have said that
09:27:49 17 they don't have to prove.

09:27:50 18 So as a result, no crime has been
09:27:53 19 committed. And the indictment must be dismissed
09:27:57 20 either before trial or during --

09:28:02 21 THE COURT: Well, you -- the government
09:28:03 22 has taken the position, at least in some of their
09:28:05 23 briefs, that it's not -- I mean, they don't have to
09:28:07 24 prove there's a victim necessarily because they don't
09:28:15 25 have to prove, for instance, a conspiracy. You don't

09:28:18 1 have to prove it worked to be illegal, right?

09:28:23 2 MR. ROSEN: That would be correct. But
09:28:24 3 still the object of the scheme still has to be
09:28:27 4 obtaining -- and *Kelly* was very clear on that -- the
09:28:30 5 object of the scheme still has to be obtaining money
09:28:33 6 or property from a victim.

09:28:35 7 Simply obtaining money or property from
09:28:38 8 the amorphous trading public is wholly insufficient,
09:28:42 9 just like under *Kelly*, obtaining control of the bridge
09:28:45 10 lanes was wholly insufficient. You have to obtain
09:28:49 11 money or property from the alleged victim. In that
09:28:51 12 case, they did not allege that. And so the
09:28:56 13 indictment -- ultimately, the Supreme Court dismissed
09:28:58 14 it.

09:28:59 15 Same here. Certainly, you know, we're not
09:29:00 16 arguing on their conspiracy everything has to succeed.
09:29:04 17 We are arguing that still it's the victim's -- the
09:29:09 18 victims must be victimized. They must have money or
09:29:13 19 property, either obtained by -- that is obtained by
09:29:14 20 the defendants from those actual people.

09:29:19 21 THE COURT: And I know it's your position.
09:29:22 22 But I want you to tell me why you think it's right
09:29:26 23 that just the failure to plead that in the indictment
09:29:31 24 makes it faulty, as opposed to, you know, what the
09:29:36 25 government always argues in a motion to dismiss, is,

09:29:39 1 they quoted the statute, that's enough.

09:29:41 2 MR. ROSEN: I guess, Your Honor, I just go
09:29:43 3 back to the fact that in order to charge a crime you
09:29:46 4 have to actually charge a crime.

09:29:48 5 And the Supreme Court's been very clear
09:29:51 6 that unless you say that the money or property comes
09:29:53 7 from the victim, as opposed to simply a defendant's
09:29:57 8 using trading to obtain money or property for
09:30:01 9 themselves, and you don't allege that, then that's not
09:30:04 10 a crime charged.

09:30:05 11 Now I understand Your Honor is saying,
09:30:07 12 well, maybe we should flesh this out a little bit more
09:30:10 13 with the facts. But we've had a ton of briefing on
09:30:13 14 the matter. We've gotten the government's perspective
09:30:15 15 on multiple occasions regarding that. They've walked
09:30:18 16 away from everything from -- that our guys were
09:30:21 17 responsible for a pump and dump to the fact that the
09:30:23 18 victims aren't going to testify that they lost money
09:30:26 19 specifically as a result of the defendants' actions.

09:30:31 20 And I think we have enough to rule on at
09:30:33 21 this time as a matter of law. And that's really our
09:30:40 22 pitch. And I think Ciminelli has made that very, very
09:30:43 23 clear under -- you know, as the Supreme Court has
09:30:45 24 ruled.

09:30:46 25 THE COURT: Okay. All right.

09:30:51 1 Mr. Armstrong, who is going to respond for
09:30:53 2 the government?

09:30:54 3 MR. ARMSTRONG: Mr. Liohos, Your Honor.

09:30:56 4 MR. LIOLOS: Good morning, Your Honor.

09:30:57 5 John Liohos for the United States.

09:31:06 6 At the motion to dismiss stage, as you
09:31:07 7 know, we look at the allegations in the indictment.
09:31:09 8 The indictment alleges the defendants, in their own
09:31:12 9 words, the object of the scheme was to "rob idiots of
09:31:15 10 their money."

09:31:18 11 The fraud statutes don't require a
09:31:20 12 specific victim be the intent of the scheme.

09:31:23 13 It's plain and simple in the defendants'
09:31:25 14 own words that they're looking to get money from their
09:31:27 15 victims as a result of their scheme. That's who
09:31:31 16 they're directing the efforts at.

09:31:33 17 The misleading statements are designed to
09:31:35 18 entice people to trade in the stocks that they're
09:31:39 19 selling so that they can get money for the shares that
09:31:41 20 they have on the backs of the people that they're --

09:31:43 21 THE COURT: Is there any place in the
09:31:45 22 indictment -- and I know that one quote you're
09:31:46 23 referring to, and I know that's the subject of every
09:31:51 24 defendants' motion in limine, and we'll get to that
09:31:54 25 later on.

09:31:56 1 But there's nowhere in the indictment
09:32:01 2 you've alleged that there is an intent to deprive
09:32:04 3 anyone of money or property. I mean, I've not only
09:32:12 4 read it word for word, but I've had -- I've had my
09:32:15 5 secretary word search it with every possible word
09:32:19 6 combination we can come up with.

09:32:22 7 And now you do allege that the purpose of
09:32:28 8 the scheme or the intent of the scheme was to enrich
09:32:30 9 the defendants, which is half the equation. But what
09:32:35 10 about the other half?

09:32:37 11 MR. LIOLOS: Well, by seeking to pump and
09:32:39 12 dump stocks and by using their public statements to
09:32:41 13 entice people to buy the stocks. And the way that the
09:32:43 14 defendants were enriching themselves was by selling
09:32:46 15 the shares they had to, in large part, the people they
09:32:50 16 were enticing to buy the stocks.

09:32:52 17 The indictment is, you know, littered to
09:32:55 18 references with inducing them through their false and
09:32:58 19 misleading statements to depart with their own money
09:33:03 20 to the benefit of the defendants.

09:33:04 21 But the victims themselves have to come in
09:33:07 22 in response to the defendants' statements through
09:33:09 23 which they're seeking to pump and dump the stock and
09:33:13 24 part with their money or property to the benefit of
09:33:16 25 the defendants. I mean, there's examples in the

09:33:18 1 indictment over and over again.

09:33:19 2 THE COURT: Okay. So you're conceding --
09:33:21 3 at least I hear you now concede that that's something
09:33:24 4 you have to prove?

09:33:26 5 MR. LIOLOS: We will at trial.

09:33:27 6 But I think for the purposes of the motion
09:33:31 7 to dismiss, it's throughout the indictment that they
09:33:33 8 were seeking to induce people with their false and
09:33:35 9 misleading statements to part with their money or
09:33:37 10 property so that they could, quote, rob them of that.

09:33:44 11 THE COURT: Here's my problem. In your
09:33:49 12 response -- not necessarily your response, but the
09:33:51 13 government's response to Mr. Rosen's motion, the
09:33:55 14 response was basically: We don't have to prove there
09:34:00 15 were victims. You know, we've got some victims, and
09:34:05 16 we're going to prove materiality through them, but we
09:34:09 17 don't have to prove intent to deceive and intent to
09:34:12 18 deprive money and property.

09:34:14 19 That's the way I read it.

09:34:16 20 MR. LIOLOS: So we do have to prove the
09:34:17 21 intent. We don't have to prove that it, in fact,
09:34:21 22 succeeded, right?

09:34:21 23 So the focus is on the scheme and how it
09:34:24 24 was concocted by the defendants and the fact that they
09:34:26 25 had the fraudulent intent to deprive people of their

09:34:29 1 money and property.

09:34:30 2 It's the scheme itself --

09:34:31 3 THE COURT: Right. And so my question is:

09:34:33 4 Given what you just said, don't you have to plead that
09:34:38 5 in the indictment?

09:34:39 6 MR. LIOLOS: I believe that the indictment
09:34:40 7 has multiple examples of showing how they intended to
09:34:43 8 induce people to part with their money or property.

09:34:46 9 THE COURT: No, no, no. Deprive them of
09:34:48 10 their money and property.

09:34:49 11 MR. LIOLOS: Through false and misleading
09:34:51 12 statements. And they have to spend their money to
09:34:52 13 purchase the stocks --

09:34:53 14 THE COURT: Okay. So if I hypothetically
09:34:59 15 invest in GM and I go on the internet and say GM's
09:35:08 16 just invented an electric car that actually works, and
09:35:13 17 who wouldn't buy stock in that?

09:35:16 18 And other people go, yeah, what a good
09:35:22 19 idea. Or, closer to home, I see what the
09:35:31 20 administration is doing regarding oil and gas and it's
09:35:39 21 driving the price of oil and gas up. And I say, man,
09:35:42 22 who wouldn't invest in an oil company right now? I'm
09:35:44 23 investing in an oil company. And I'm doing it because
09:35:47 24 I want to make money, which I don't think is illegal.
09:35:59 25 And I don't care, number one, whether you make money

09:36:03 1 or not. I care about whether I make money.

09:36:09 2 At the same time, I don't intend for you
09:36:12 3 to lose money. If the price of oil goes to \$100 a
09:36:20 4 barrel, everybody wins.

09:36:22 5 That's not illegal, is it?

09:36:24 6 MR. LIOLOS: Well, the part I think that's
09:36:25 7 missing from that example that's pled over and over
09:36:27 8 again in the indictment is the fraudulent intent,
09:36:30 9 right?

09:36:30 10 And so your example is you believed in the
09:36:34 11 company itself and you believed in the information you
09:36:35 12 were putting out there and you were hopeful that you
09:36:38 13 were going to make money on it.

09:36:39 14 The indictment pleads examples over and
09:36:41 15 over again where it shows coordinating of messages to
09:36:43 16 induce people --

09:36:45 17 THE COURT: Okay. And that's -- and I'm
09:36:46 18 reading that as -- after I read *Ciminelli* and
09:36:51 19 *Greenlaw*, that's half of the equation; the intent to
09:36:55 20 deceive.

09:36:58 21 MR. LIOLOS: Of money or property.

09:36:59 22 THE COURT: Well, that's the other half.

09:37:00 23 MR. LIOLOS: But they have to buy the
09:37:02 24 stock --

09:37:02 25 THE COURT: Is to obtain money or

09:37:03 1 property. The defendants didn't obtain any money or
09:37:06 2 property from anybody.

09:37:09 3 MR. LIOLOS: Well, part of the scheme
09:37:10 4 that's pled is that they're selling after inducing.

09:37:13 5 THE COURT: It's not a zero-sum game.
09:37:18 6 It's not like, you know, there's only \$100 here. And
09:37:22 7 if I get 20, you lose 20.

09:37:26 8 MR. LIOLOS: The defendants have a set
09:37:27 9 amount of shares that they have to sell to make money
09:37:30 10 after their post, right? And somebody has to buy
09:37:33 11 them. They're using their false and misleading posts
09:37:35 12 to induce people --

09:37:36 13 THE COURT: Well, how do you know the
09:37:37 14 people that bought them ever saw any of these posts?

09:37:41 15 MR. LIOLOS: Well, it's alleged in the
09:37:42 16 indictment and we'll hear from some at trial.

09:37:45 17 THE COURT: So you're not limiting your
09:37:47 18 witnesses to materiality. I mean, that's what you
09:37:54 19 told the Court in your brief.

09:37:55 20 MR. LIOLOS: Whether it could influence
09:37:59 21 them or was capable of doing so is the materiality
09:38:03 22 question. I expect that they'll testify that not only
09:38:06 23 could it, it also, in fact, did in certain instances,
09:38:09 24 so... .

09:38:13 25 THE COURT: Okay. Now how does that --

09:38:17 1 and the intent to do that is just implied?

09:38:19 2 MR. LIOLOS: I think it's alleged over and
09:38:21 3 over again in the indictment that they sought to do so
09:38:24 4 with the scheme. And the intent is --

09:38:25 5 THE COURT: Not what's alleged in the
09:38:27 6 indictment. And I have the indictment right here.

09:38:50 7 [As read:] The defendants used social
09:38:51 8 media to induce other investors to purchase and hold
09:38:53 9 the same securities that the defendants were selling
09:38:57 10 or dumping so that defendants could maximize their own
09:39:00 11 profits.

09:39:02 12 Now, that's alleged several times. But
09:39:05 13 there's nothing about them depriving people from money
09:39:12 14 or property, which is what *Greenlaw* now says we have
09:39:14 15 to have.

09:39:15 16 Now, admittedly, this indictment came out,
09:39:20 17 I think, before *Greenlaw*. I don't remember the date
09:39:22 18 of it, but it's -- *Greenlaw* is an October case.

09:39:27 19 MR. LIOLOS: I think you're right.

09:39:29 20 THE COURT: Yeah. This was six months
09:39:30 21 before *Greenlaw*. And so you can obviously tell I'm
09:39:34 22 worried whether we have a defective indictment.

09:39:37 23 MR. LIOLOS: Well, Your Honor, if you look
09:39:38 24 at paragraph 12, it states: The defendants used their
09:39:41 25 credibility to maximize their own trading profits

09:39:44 1 through their tweets and posts in the Atlas Trading
09:39:47 2 Discord, often at the expense of their Twitter
09:39:54 3 followers and members of the -- at the expense of
09:40:02 4 their Twitter followers and members the Alice Trading
09:40:02 5 Discord. Indeed, the defendants used their social
09:40:05 6 media influence to pump and dump securities for their
09:40:07 7 own financial gain.

09:40:08 8 Those two sentences together explain that
09:40:11 9 it's as the defense of their -- at the expense of
09:40:14 10 their followers.

09:40:16 11 And then if you look at the GTT example,
09:40:36 12 which is -- starts on paragraph 43 and it's charged in
09:40:40 13 Count 7, that walks through a specific example where
09:40:45 14 they're using the false and misleading statements to
09:40:48 15 induce people seeing the false and misleading
09:40:51 16 statements, commenting, oh, there it is, there it is,
09:40:55 17 selling right after it and describing it as robbing
09:41:02 18 people of their money.

09:41:13 19 THE COURT: Anybody else want to weigh in
09:41:14 20 on this?

09:41:18 21 MR. FORD: Your Honor, if I may briefly.

09:41:29 22 THE COURT: Now, I will tell you that the
09:41:30 23 acoustics in Judge Hoyt's courtroom, because it's so
09:41:35 24 much bigger, aren't really any better. So you're
09:41:36 25 going to have to stay near a microphone when you speak

09:41:39 1 up there.

09:41:40 2 MR. FORD: I think, Your Honor, you've
09:41:46 3 driven into the main issue with the defect in their
09:41:50 4 indictment. If we go back to *Ciminelli*, the facts as
09:41:53 5 alleged in *Ciminelli* were that but for the state of
09:41:56 6 New York knowing that bribes were being paid, they
09:41:59 7 would have paid the money to somebody else, they would
09:42:01 8 have used different construction companies, right.

09:42:04 9 The issue with their indictment is that
09:42:07 10 all transactions that are alleged are bona fide at
09:42:12 11 market prices that anybody who purchased the shares
09:42:16 12 knew about at the time that they entered into those
09:42:18 13 transactions.

09:42:18 14 The volume that was occurring in the
09:42:22 15 market on the stocks that Mr. Constantinescu is
09:42:26 16 alleged to have been involved in, it's extraordinary.
09:42:30 17 We're talking, for example, with ONTX, Count 2 is the
09:42:35 18 first substantive count in the indictment. 180
09:42:39 19 million transactions -- 180 million transactions in a
09:42:44 20 day. And that's executed transactions, meaning 180
09:42:49 21 million buys and 180 million sells by market
09:42:54 22 participants.

09:42:55 23 Every single person who entered into those
09:42:58 24 transactions knew the price they were buying or
09:43:01 25 selling at. It was the only price available through

09:43:04 1 their broker/dealer.

09:43:05 2 It is essentially identical facts to
09:43:09 3 what's happening in *Ciminelli*, as Mr. Rosen pointed
09:43:14 4 out. The issue here is there is no property being
09:43:19 5 sought to be obtained. They're simply repackaging the
09:43:23 6 right to control theory, and the Supreme Court
09:43:24 7 rejected it. It has been applied now to the
09:43:27 8 securities contexts in other cases.

09:43:30 9 And I'm not saying this is exactly on
09:43:32 10 point, but the Second Circuit has applied it in *SEC v. Govil*, in *United States v. Greenlaw*, in our circuit,
09:43:38 11 in the Fifth Circuit, it has been made clear that it
09:43:41 12 applies to 1348 specifically in securities fraud.

09:43:48 14 We agree with Mr. Rosen and we agree with
09:43:50 15 Your Honor that this indictment is defective as pled.

09:43:54 16 THE COURT: Let me ask you, either one of
09:43:56 17 you or any of the defense lawyers, let's say I grant
09:44:04 18 your motion.

09:44:07 19 What happens next?

09:44:09 20 MR. FORD: We're --

09:44:11 21 THE COURT: Don't we think Mr. Armstrong
09:44:14 22 will go back and add a paragraph that says and, oh, by
09:44:17 23 the way, they intended to deprive -- I mean, won't you
09:44:23 24 just get reindicted?

09:44:25 25 MR. FORD: We don't believe so, because

09:44:27 1 there's no facts that would support the case that the
09:44:31 2 government is alleging. What we think will happen,
09:44:33 3 Your Honor, is there is a parallel SEC pleading, a
09:44:38 4 parallel SEC complaint. We believe this is an SEC
09:44:41 5 action. In SEC actions they are not required to prove
09:44:45 6 intent. And they are not required to prove that
09:44:48 7 somebody is trying to obtain money or property. It's
09:44:51 8 a different statute.

09:44:52 9 And so we will be prepared, once the case
09:44:55 10 is dismissed, to argue it in the SEC action, which is
09:44:58 11 where it belongs.

09:44:59 12 We don't believe that this indictment can
09:45:01 13 be corrected. We now are sitting on, you know, half
09:45:04 14 of the Amazon rainforest that's been printed out in
09:45:08 15 papers. And there is nothing in it that will support
09:45:11 16 the notion that any one of these seven defendants
09:45:14 17 sought to obtain money or property.

09:45:17 18 And, you know, I will say there is another
09:45:22 19 hook to this, which is the fact that the government
09:45:24 20 continues to say that they caught one of the indicted
09:45:30 21 co-defendants in a separate Discord chat room with
09:45:35 22 only -- none of the defendants but one were even in
09:45:39 23 that room. It was a totally different group of
09:45:41 24 people. My client was not there. Mr. Rybarczyk was
09:45:44 25 not there. Mr. Matlock was not there. The top three

09:45:50 1 individuals in the indictment weren't there.

09:45:53 2 THE COURT: This is a conversation where
09:45:54 3 they use the word "rob"?

09:45:57 4 MR. FORD: Yeah.

09:45:57 5 THE COURT: Was that Mr. Knight?

09:45:58 6 MR. FORD: Mr. Knight said it.

09:45:59 7 Mr. Cooperman was there. He didn't say no, that's not
09:46:03 8 what we're doing.

09:46:03 9 MS. EPLEY: Your Honor --

09:46:09 10 MR. FORD: That's exactly what he said.

09:46:10 11 MS. EPLEY: I'll step right back out. I
09:46:12 12 just wanted to clarify for Mr. Liohos.

09:46:15 13 Tommy Cooperman's response was actually
09:46:15 14 the people in GTT are making more money than we did.
09:46:18 15 So he disagrees with the assertion.

09:46:20 16 MR. FORD: That's the only individual of
09:46:21 17 these defendants in the room. The fact that they were
09:46:23 18 able to find somebody with drug and alcohol addiction
09:46:27 19 who made, you know, a joke comment referencing hedge
09:46:30 20 funds flippant, does not suggest intent on behalf of
09:46:36 21 the seven guys who have now fought for 16 months of
09:46:38 22 their lives because there is nobody in this room who
09:46:40 23 believes they did anything wrong, because they did
09:46:42 24 not. We have been arguing since our first hearing
09:46:45 25 that --

THE COURT: I'm going to have to disagree with you on that. I think there are plenty of people in this room that think your guys did something wrong.

MR. FORD: I'm referring to the seven defendants. The reason we have been fighting tooth and nail the way we have is because there is not one of them who believes they did anything wrong. And they simply did not.

MR. ROSEN: Judge, if I could just weigh in on what I think are the pleading defects here regarding Mr. Liolos's example with GTT.

He talks about GTT being an example of our defendants scheming to obtain money or property from victims. It actually says the exact opposite. If you start on page -- paragraph 45, it talks about my client, Mr. Rybarczyk, falsely claiming, it says: GTT 24 RSI major multibillion dollar catalyst.

It doesn't allege that that was false. The falsity is omitting the material information that he intended to sell his own shares of GTT. We dispute that. But even for the purpose of this indictment, that's classic *Ciminelli*. He's depriving people of economically valuable information as to when he -- when he's selling his shares.

There are no other falsities alleged in

09:48:05 1 the -- in GTT. It talked about him tweeting about a
09:48:10 2 \$110 million market cap. That's true. With a \$2
09:48:13 3 billion deal in place. That's true.

09:48:15 4 The only thing is Mr. Knight, a guy my
09:48:18 5 client barely knew, he ran into him once at a car
09:48:22 6 rally and I think maybe one other time after that,
09:48:26 7 talking about -- joking about selling -- you know,
09:48:28 8 robbing idiots of their money. I guess he believed
09:48:32 9 that's what he was doing. My client certainly didn't
09:48:35 10 say that.

09:48:35 11 And then the key here is paragraph 53. It
09:48:43 12 says -- it doesn't say a single victim lost money.
09:48:45 13 Not one. It didn't say that they intended to rob a
09:48:52 14 single victim of money. It says they obtained
09:48:53 15 approximately \$200,000, \$200,000 for themselves.

09:48:57 16 So if they were going to reallege this, if
09:48:59 17 they were going to reallege this, they would have to
09:49:01 18 explain how victims actually lost money. And they
09:49:03 19 simply -- from our defendants and they simply cannot
09:49:07 20 do that. For each one of these stocks --

09:49:09 21 THE COURT: Wait a minute. Let me stop
09:49:09 22 you there.

09:49:10 23 Why can't they do that?

09:49:12 24 MR. ROSEN: Because many of these stocks
09:49:15 25 went up. Many of these people, alleged victims, we've

09:49:18 1 got their trading records, they made money.

09:49:21 2 Alleged --

09:49:21 3 THE COURT: I mean, but I bet they can
09:49:22 4 find somebody that didn't make money. I mean, I bet
09:49:26 5 they can find somebody that lost money.

09:49:28 6 MR. ROSEN: They did. And those people --
09:49:29 7 but they have to lose money from the crime. And
09:49:32 8 that's the problem. A lot of these people -- like
09:49:35 9 there's one person who lost money, she held the stock
09:49:38 10 for months. And she watched it go up, she watched it
09:49:42 11 go down. She just didn't sell, like -- so you can't
09:49:45 12 say that person lost money from our defendants. That
09:49:48 13 person lost money because they didn't sell it at the
09:49:51 14 right time. They have to allege that specifically --

09:49:53 15 THE COURT: Well, maybe they didn't sell
09:49:54 16 it because your client was saying he's holding it.

09:49:58 17 MR. ROSEN: No. But that wouldn't go on
09:50:00 18 for months because my client didn't tweet about it
09:50:03 19 after a couple days. So you have to causally connect
09:50:07 20 the statements with the person's actions.

09:50:09 21 And that brings me back to the point.
09:50:12 22 That's why there's a massive degree of difference
09:50:14 23 between what we call a traditional real pump and dump
09:50:18 24 scheme. Everyone who buys into that is a victim,
09:50:21 25 because people control all the float. They control

09:50:24 1 all the shares. And they just pump it up with false
09:50:27 2 and misleading statements and they sell that into the
09:50:29 3 market.

09:50:30 4 Those aren't real -- those aren't real
09:50:32 5 companies. Those aren't real trades. They're wash
09:50:35 6 trades, match trades. You can say everyone is a
09:50:37 7 victim because the stock cratered after that.

09:50:40 8 What we don't see here in those
09:50:43 9 indictments beyond the conclusory pump and dump that
09:50:46 10 the defendants have now walked away from is any
09:50:48 11 allegation that these stocks just like right after the
09:50:50 12 defendants got done with their mischief, that they
09:50:53 13 just tanked. Because they didn't. Many of them went
09:50:56 14 up and continued to go up.

09:51:01 15 Our clients may even -- didn't even sell
09:51:02 16 close to near the top. If they were really
09:51:04 17 controlling it, they would have.

09:51:05 18 So I agree with you that, sure, certainly
09:51:08 19 they can try to allege that, but we don't think that
09:51:10 20 they could. And it's going to be a key issue at
09:51:12 21 trial, but it should be a key issue in the indictment,
09:51:15 22 to show that they've made it that far, to present
09:51:18 23 evidence to the jury as opposed to just the grand jury
09:51:21 24 that that can be done. And that's where we have the
09:51:23 25 financial issue.

09:51:24 1 Adding simply a paragraph about intent is
09:51:25 2 insufficient when you have a speaking indictment. You
09:51:28 3 have to walk through what happened. They can't do
09:51:30 4 that.

09:51:33 5 THE COURT: Okay. Well, obviously the
09:51:35 6 reason I brought this up first is because it's
09:51:39 7 concerning to me. And it's -- I don't want to try
09:51:43 8 what y'all have proffered as a two-month case or
09:51:47 9 three-month at some point in time, I'm not conceding
09:51:51 10 it's going to take that long.

09:51:53 11 But it's going to take a long time. And I
09:51:56 12 don't want to get to the end of it and get reversed
09:52:01 13 because we didn't follow *Greenlaw*.

09:52:05 14 MR. LIOLOS: A critical difference here
09:52:06 15 between the cases that they're discussing in terms of
09:52:07 16 closing a bridge or college admission slots is they're
09:52:12 17 intending to induce people to use their money to buy
09:52:15 18 the stocks that they're selling at the same time. And
09:52:20 19 that's fraudulent intent.

09:52:22 20 MR. ARMSTRONG: Your Honor, just two
09:52:23 21 points, if I may?

09:52:23 22 I think that Your Honor is attuned to the
09:52:28 23 "intent to defraud" language. And what's being
09:52:32 24 glossed over is the clearest evidence of that point,
09:52:37 25 which is the language in the indictment of robbing

09:52:40 1 idiots of their money. That is intent to defraud all
09:52:44 2 day every day.

09:52:46 3 And the pleading requirements of an
09:52:49 4 indictment do not require hypertechnicality. It's
09:52:51 5 just a plain reading of what is alleged.

09:52:53 6 And given that that statement is
09:52:56 7 specifically alleged, and is alleged by a
09:52:58 8 co-conspirator who is charged in this case, that
09:53:02 9 clearly passes the hurdle of *Ciminelli* and property
09:53:08 10 interest that are being deprived of the victims.

09:53:11 11 And one last point on this: There is
09:53:13 12 nothing about our victim-witness testimony in this
09:53:16 13 case that we're walking away from. Mr. Rosen said
09:53:18 14 that we're not going to put up witnesses who are going
09:53:21 15 to say that they lost money. That is objectively not
09:53:24 16 true. And it is objectively recorded in the 302s that
09:53:27 17 have been produced eons ago.

09:53:30 18 And so to say that people aren't going to
09:53:32 19 testify as to that exact point has no basis in the
09:53:34 20 record. But that record is for trial and not for
09:53:36 21 purposes of actually looking at the allegations of the
09:53:40 22 indictment.

09:53:49 23 THE COURT: Mr. Armstrong, let's say
09:53:51 24 hypothetically I agree with you on the robbing
09:53:54 25 statement. Does that come into evidence? Obviously,

09:53:57 1 you think it does.

09:53:59 2 MR. ARMSTRONG: It comes in --

09:54:00 3 THE COURT: Under what theory?

09:54:03 4 MR. ARMSTRONG: It comes in under a number
09:54:04 5 of theories.

09:54:05 6 Number one, it comes in as non-hearsay,
09:54:11 7 under 801(d)(2)(e). As a statement of a
09:54:12 8 co-conspirator, during and in furtherance of the
09:54:16 9 conspiracy.

09:54:16 10 THE COURT: Tell me how it's in
09:54:18 11 furtherance.

09:54:19 12 MR. ARMSTRONG: Because Mr. Knight is
09:54:20 13 telling other people on the call, including
09:54:23 14 Mr. Cooperman, what is the best way to profit from
09:54:25 15 what we're doing. How can we all -- including
09:54:27 16 Mr. Knight, how can we all make the most money from
09:54:31 17 another co-defendants' tweets.

09:54:33 18 THE COURT: And his statement that we're
09:54:34 19 robbing these people helps them do that?

09:54:38 20 MR. ARMSTRONG: It doesn't have to help
09:54:40 21 them do that. A statement that in furtherance under
09:54:43 22 801(d)(2)(e) just has to update other co-conspirators
09:54:48 23 as to the status of the plan. And it's not as idle
09:54:50 24 chatter. It's literally saying here is what we're
09:54:52 25 doing and here's how we can profit more from what

09:54:56 1 we're doing.

09:55:00 2 THE COURT: Okay. All right.

09:55:03 3 Anybody else want to weigh in?

09:55:09 4 MS. EPLEY: I don't know that I have -- I
09:55:13 5 don't know that I have anything to add to that. But
09:55:14 6 as the person who filed it -- or from Team Cooperman,
09:55:19 7 I think the judge has hit the nail on the head in
09:55:21 8 regards to furtherance of the conspiracy. It's
09:55:23 9 nothing more than idle chatter and it's clear on the
09:55:25 10 face.

09:55:25 11 If you listen to the six hours of Dan
09:55:28 12 Knight talking that day, he is -- and I say -- I
09:55:31 13 apologize to the Court, but he is farting, he is
09:55:34 14 burping, he is making ridiculous analogies, he's a
09:55:37 15 mess.

09:55:37 16 And at this point he's talking about
09:55:38 17 himself and himself alone. He's not talking to anyone
09:55:41 18 else who is listed in the conspiracy. The only person
09:55:44 19 relevant to the indictment who is also present but not
09:55:47 20 participating in that commentary is Tommy Cooperman,
09:55:50 21 who says he disagrees with Dan Knight's assessment.

09:55:55 22 He's not inducing anyone to do anything.
09:55:57 23 He's not moving a conspiracy forward in regards to
09:55:59 24 anyone who matters. He's talking nonsense, as he
09:56:03 25 often does.

09:56:03 1 And at most, in regards to his own
09:56:06 2 intentions.

09:56:09 3 MR. ARMSTRONG: Your Honor, I mean, we can
09:56:09 4 play the recording. We have the recording on the
09:56:12 5 government exhibit list. He's telling someone else on
09:56:16 6 the call just add zeros, add more money to your buys.
09:56:19 7 At the same time he's --

09:56:20 8 THE COURT: Okay. Well, that part
09:56:23 9 might -- that sounds like it might be in furtherance
09:56:27 10 of a conspiracy, buy more stock, you know. But the
09:56:30 11 we're robbing people, is that in furtherance of
09:56:33 12 anything?

09:56:33 13 MR. ARMSTRONG: Of course. That explains
09:56:35 14 why you should add zeros instead of just, you know,
09:56:37 15 going out on a lark and doing something random. It's
09:56:40 16 critical context to explain why and how you should
09:56:43 17 profit the most from this conspiracy.

09:56:46 18 MS. EPLEY: I don't want to keep talking
09:56:47 19 in a way that's going to change the Court's opinion,
09:56:49 20 but I do want to draw kind of an analogy or corollary.

09:56:53 21 GTT stock was doing well. It's continuing
09:56:54 22 to make money and the price is continuing to increase.
09:56:57 23 By definition then, buying the stock at that time
09:56:59 24 would lead to profitability for all players. And
09:57:02 25 that's just a virtue of the buy/sell sides of a coin

09:57:06 1 in regards to trades.

09:57:07 2 It has absolutely nothing to do with any
09:57:11 3 conspiracy as to false statements at all, which is the
09:57:14 4 root of what is required by the government. They are
09:57:16 5 not alleging that he said go tell people you're
09:57:18 6 holding when you're not. He's saying go buy more
09:57:21 7 stock because it's profitable.

09:57:25 8 MR. FORD: And, Your Honor, just to be
09:57:26 9 clear, he's saying that to people who will not appear
09:57:29 10 as part of this trial. They are not co-defendants.
09:57:34 11 They will not be called as witnesses. It is a room
09:57:37 12 full of people we will never hear from.

09:57:40 13 The only person present on the indictment,
09:57:43 14 other than Dan Knight, is Tommy Cooperman, who
09:57:46 15 unequivocally says he disagrees with Mr. Knight.

09:57:55 16 At a minimum, we're going to request a
09:57:58 17 limiting instruction on this statement --

09:58:01 18 THE COURT: I think you already have in
09:58:08 19 about ten different motions.

09:58:09 20 MR. FORD: And jokes aside, Your Honor,
09:58:11 21 the issue is, it is so far from what is in these
09:58:16 22 gentlemen's minds. They are trying to build their
09:58:18 23 lives as influencers who pick great stocks. If they
09:58:21 24 don't pick stocks that make money for people, they
09:58:23 25 cannot be influencers.

09:58:24 1 That's our theory. They would not engage
09:58:26 2 in acts or conduct that were harmful, period. But --
09:58:30 3 and to go back to the *Ciminelli* point, which drives
09:58:32 4 this whole conversation, there is nothing in the
09:58:36 5 indictment and there is nothing in this evidentiary
09:58:39 6 record that shows anybody ever trying to obtain money
09:58:42 7 or property.

09:58:43 8 What they are simply doing is coming up
09:58:46 9 with the best way to be good at what they want to do,
09:58:49 10 which is, in addition to already being successful
09:58:53 11 stock traders, become influencers on the internet by
09:58:56 12 picking the best stocks for the companies with the
09:58:59 13 stocks that are most likely to go up.

09:59:01 14 The notion that Dan Knight's sentiment,
09:59:05 15 again in his drunken and drug-induced statements,
09:59:09 16 applies to these other individuals, it should never be
09:59:13 17 heard by the jury. It should have never been alleged
09:59:16 18 in the indictment. And it should not have appeared on
09:59:18 19 the Daily Show or in the hundreds if not thousands of
09:59:21 20 newspaper articles that have now ruined my client's
09:59:25 21 reputation for the rest of his life.

09:59:27 22 That is the foundation of this. For the
09:59:31 23 government to stand up and repeatedly say they were
09:59:34 24 robbing, they were robbing, nobody was even there when
09:59:36 25 the statement was said.

09:59:42 1 MR. ARMSTRONG: Your Honor, just to make
09:59:44 2 sure that we're laser focused on what the requirements
09:59:46 3 of the rule are. It's a statement by a
09:59:49 4 co-conspirator. Mr. Knight is charged in the
09:59:53 5 indictment. There's no requirement that it has to be
09:59:55 6 directly to another defendant actually charged in the
10:00:00 7 conspiracy.

10:00:01 8 But as it happens, we do have that because
10:00:03 9 Mr. Cooperman was in this same chat. That's not the
10:00:06 10 requirement. The requirement is it by a
10:00:10 11 co-conspirator during. Of course it was. Was it in
10:00:13 12 furtherance. Yes, it was.

10:00:14 13 So under those three requirements it fits
10:00:16 14 all three. Thank you.

10:00:22 15 THE COURT: I'll give you a general
10:00:24 16 denial.

10:00:24 17 MS. EPLEY: Thank you, Your Honor. We'll
10:00:24 18 take it.

10:00:35 19 THE COURT: All right. Before we actually
10:00:36 20 start talking about motions in limine, which is
10:00:41 21 ultimately what we're going to address today, I've got
10:00:51 22 a letter -- and I can't remember from which lawyer --
10:00:53 23 but basically said there were various motions that he
10:00:57 24 thought were outstanding, including the one we just
10:00:59 25 talked about.

10:01:01 1 I didn't remember these necessarily being
10:01:10 2 still a problem, because I've gotten various letters
10:01:13 3 where we've said we've worked this out. So let me --
10:01:20 4 they're primarily motions by the defense counsel.

10:01:23 5 Are there any motions that you think the
10:01:28 6 Court needs to address from anyone?

10:01:34 7 MS. CORDOVA: Good morning, Your Honor,
10:01:37 8 Laura Cordova on behalf of Mitchell Hennessey.

10:01:40 9 We do have a pending motion for -- to
10:01:42 10 compel the production of drafts under *Jencks* Act. The
10:01:47 11 government has refused categorically to provide any
10:01:50 12 drafts. And we have requested that the Court conduct
10:01:55 13 an in-camera review of drafts to identify those which
10:01:59 14 are *Jencks*. It is often the case --

10:02:00 15 THE COURT: Drafts of?

10:02:01 16 MR. CORDOVA: I'm sorry. Of expert
10:02:03 17 reports and agents' search warrant affidavits. Both
10:02:09 18 of those, the expert will be testifying as well as the
10:02:11 19 agent.

10:02:12 20 And it is often the case, based on my
10:02:16 21 experience as a prosecutor and just working on cases
10:02:19 22 for many, many years, that agents and expert reports
10:02:23 23 produce drafts to the prosecutors who then review them
10:02:26 24 and give comments back.

10:02:27 25 Those drafts would be *Jencks* material.

10:02:30 1 We've cited cases in our brief explaining that and
10:02:34 2 supporting that proposition.

10:02:36 3 The government has categorically refused
10:02:38 4 to produce any drafts whatsoever. And, therefore, we
10:02:43 5 request that the Court, at the very least, conduct an
10:02:46 6 in-camera review to identify those drafts which are
10:02:49 7 *Jencks* material.

10:02:50 8 We also note, and it's become more
10:02:52 9 apparent as this case has developed, that these drafts
10:02:56 10 will likely constitute *Giglio* material as well, as
10:02:59 11 they go to the credibility of expert, as well as the
10:03:03 12 agent who will be testifying.

10:03:04 13 We have identified some very serious
10:03:06 14 errors in these reports and affidavits. And,
10:03:10 15 therefore, the process by which those documents were
10:03:14 16 created is important and could go directly to the
10:03:17 17 credibility of the witness who will be testifying.

10:03:23 18 THE COURT: Mr. Armstrong, you want to
10:03:24 19 weigh in on this?

10:03:25 20 MR. ARMSTRONG: Sure, Your Honor. From my
10:03:32 21 memory, it was a long time ago now, the witness's
10:03:33 22 statement is their final statement under the law,
10:03:37 23 especially and that's definitely the case for expert
10:03:41 24 reports. The expert report is the witness's
10:03:45 25 statement. And, of course, that's *Jencks* and of

10:03:48 1 course has to be turned over.

10:03:49 2 But the process of iterations is not the
10:03:53 3 actual statement because it can change. And it's not
10:03:57 4 final and it's not the witness's statement until the
10:04:00 5 ink is actually dry.

10:04:01 6 And the same thing applies for affidavits
10:04:03 7 as well. Of course, we turned over the affidavits
10:04:05 8 from the testifying agent in this case because that's
10:04:07 9 what the agent actually signed, and that he affirmed
10:04:11 10 in that signed document that that document is his
10:04:15 11 statement. What comes before is categorically not a
10:04:19 12 *Jencks* statement.

10:04:21 13 THE COURT: What volume of material are we
10:04:23 14 talking about?

10:04:24 15 MR. ARMSTRONG: For?

10:04:25 16 THE COURT: If I granted the motion.

10:04:29 17 MR. ARMSTRONG: Off the top of my head, I
10:04:30 18 don't know, Your Honor. It's been a long time. There
10:04:33 19 definitely were drafts, of course, but I'd have to go
10:04:37 20 back and look. I don't know off the top of my head.

10:04:40 21 THE COURT: Okay. Any other motions that
10:04:48 22 I need to look at before we move on to limines?

10:05:00 23 Okay.

10:05:19 24 (The Court speaks in *sotto voce*.)

10:05:55 25 THE COURT: All right. I want to start

10:05:57 1 with -- this is one of Mr. Rybarczyk's motions. 535
10:06:05 2 is the docket number. It's addressing Government's
10:06:16 3 Exhibit Number 1.

10:06:27 4 And I don't know, Mr. Williams, you or
10:06:28 5 Mr. Rosen?

10:06:30 6 MR. WILLIAMS: Yes, Your Honor.

10:06:36 7 Your Honor, I know that others have
10:06:37 8 weighed in on this in related matters. So I'd welcome
10:06:43 9 the co-defendants' lawyers to weigh in on this.

10:06:46 10 But primarily our objection to Government
10:06:48 11 Exhibit Number 1 is under 401, 403, and then 1006.

10:06:53 12 First of all, it's not a proper summary
10:06:55 13 chart. It's not relevant. And then any relevance it
10:06:59 14 does have is exceeded by the undue prejudice that
10:07:05 15 outweighs any probative value.

10:07:07 16 And when you look at Government Exhibit
10:07:09 17 Number 1, it's a compilation of pictures from various
10:07:11 18 defendants' social media, some of which are extremely
10:07:15 19 offensive.

10:07:15 20 There are at least three with individuals
10:07:18 21 giving the Hawaiian good luck sign, otherwise known as
10:07:22 22 the bird or the middle finger, to the viewer. Those
10:07:25 23 certainly, I think, are beyond the pale and don't have
10:07:27 24 any place in this courtroom, because they're designed,
10:07:30 25 like many of these pictures, solely to enflame the

10:07:34 1 jurors against the defendants and cause them to render
10:07:35 2 a verdict on an improper basis.

10:07:37 3 Along those lines, we have ostentatious
10:07:41 4 displays of wealth or fast cars, nice clothes, et
10:07:47 5 cetera, which appeal to class prejudice and aren't
10:07:53 6 relevant, because we know and there will be evidence
10:07:54 7 that our clients profited from their stock trading.

10:07:57 8 There are other exhibits the government
10:08:00 9 intends to proffer that say that. It's really not in
10:08:03 10 dispute. So their success and their ability to buy
10:08:06 11 luxury consumer goods does not help the jury decide
10:08:08 12 any contested fact in the case.

10:08:17 13 It also is misleading because it presents
10:08:19 14 this idea that the defendants hung out all the time in
10:08:21 15 all of these places, on private jets. When, for
10:08:22 16 example, with respect to Mr. Rybarczyk, those are the
10:08:24 17 only pictures of him with any defendant anywhere.

10:08:26 18 And by describing this as a summary chart,
10:08:29 19 it suggests improperly and inaccurately that there are
10:08:33 20 a number of other photos that aren't in the chart of
10:08:35 21 Mr. Rybarczyk physically hanging out with the other
10:08:37 22 defendants in various places, whether Vegas, jets,
10:08:43 23 pool sides, that sort of thing. And it's misleading
10:08:45 24 on top of the other problems.

10:08:48 25 And again, as we've cited in the case law,

10:08:51 1 this appeals to a type of class prejudice or class
10:08:56 2 warfare that, again, is incited. It's designed to
10:09:00 3 incite -- to make the jurors mad at the defendants, to
10:09:02 4 make them jealous and make them mad and make them look
10:09:05 5 at that rather than use their reason, the other
10:09:09 6 evidence and their commonsense to decide the verdict.

10:09:11 7 And so by showing them offensive pictures
10:09:12 8 and pictures of them in, you know, contexts of lavish
10:09:19 9 displays of wealth, it appeals to their emotions
10:09:22 10 rather than their reason, which is what they have to
10:09:24 11 use to determine the evidence and evaluate it in this
10:09:28 12 case.

10:09:28 13 And the case law we've cited says: You
10:09:31 14 can't -- you know, you can't use a summary chart to
10:09:33 15 create a conspiracy where one doesn't otherwise exist.
10:09:37 16 And so by juxtaposing these images of the defendants,
10:09:42 17 some of which are inaccurate, misleading, and
10:09:43 18 offensive, they're just trying to substitute that for
10:09:46 19 other evidence.

10:09:47 20 And even if the government contends that's
10:09:49 21 not accurate, then it's cumulative, because there are
10:09:52 22 numerous other examples that the government intends to
10:09:54 23 offer, including Discord chats. We've heard a
10:09:57 24 discussion about the robbing idiots of their money and
10:10:01 25 other examples of the defendants in communication with

10:10:06 1 one another and others, both inside and outside the
10:10:08 2 indictment, that these photographs of them physically
10:10:11 3 in places are cumulative and they're irrelevant.
10:10:15 4 They're unnecessary and should also be excluded under
10:10:17 5 403 on that basis.

10:10:22 6 And so that's subject of our motion. And
10:10:23 7 I invite co-defendants' lawyers to weigh in.

10:10:26 8 THE COURT: Anybody else want to
10:10:27 9 address -- it's basically Government's 1?

10:10:32 10 MS. CORDOVA: Yes, Your Honor. On behalf
10:10:33 11 of Mr. Hennessey, we also included this in our motion
10:10:37 12 in limine. This Government Exhibit 1 is a montage of
10:10:40 13 various posts, photographs of the defendants.

10:10:45 14 What it does is, it takes offensive
10:10:48 15 photos, like Mr. Williams just identified with the
10:10:53 16 middle finger up, using words like "the SEC finally
10:10:56 17 got me," ostentatious cars, all this sort of thing.

10:11:00 18 And what it does is it sandwiches
10:11:01 19 Mr. Hennessey in there, even though he didn't ever
10:11:05 20 post or buy any fancy cars. He didn't say anything
10:11:08 21 about the most wanted or SEC or anything like that.
10:11:13 22 He never did anything like that.

10:11:15 23 But what they've done is they've tried to
10:11:18 24 group him together with these inflammatory photos that
10:11:20 25 really, as Mr. Williams said, don't go to prove

10:11:24 1 whether or not these guys committed the crime charged.

10:11:25 2 They just go to inflame the jury and
10:11:28 3 confuse them and think, oh, these guys were all
10:11:31 4 together. It serves no real purpose at trial. And we
10:11:33 5 think it's extremely prejudicial as to Mr. Hennessey,
10:11:35 6 for whom there is no such photo. They can't find
10:11:40 7 anything like that for Mr. Hennessey. So they try to
10:11:41 8 lump him in with everybody else.

10:11:49 9 THE COURT: So he's not photographed
10:11:49 10 anywhere here?

10:12:00 11 MS. CORDOVA: He's in there, Your Honor.
10:12:00 12 I can give you -- he's on page 8.

10:12:01 13 THE COURT: Okay. And who's he pictured
10:12:04 14 there with?

10:12:04 15 MS. CORDOVA: On the left-hand side he's
10:12:06 16 with Mr. Deel, Mr. Cooperman, and Mr. Hennessey giving
10:12:11 17 the thumb up.

10:12:12 18 And then you have just his head shot in
10:12:12 19 the middle.

10:12:13 20 And then there's a picture on the right,
10:12:15 21 which is a whole group of people, including some of
10:12:17 22 the defendants, but other people who are not
10:12:19 23 defendants, never alleged to be co-conspirators. I
10:12:21 24 think they're at a bar or somewhere. It's just a
10:12:24 25 group photo.

10:12:28 1 THE COURT: Okay. Anyone else?

10:12:29 2 MS. CORDOVA: Your Honor, just real quick

10:12:30 3 before we move on.

10:12:32 4 There is a -- at the end of that exhibit,

10:12:35 5 there is a Pennies: Going in Raw, which is the name

10:12:38 6 of Mr. Hennessey's podcast, PGIR, there is a

10:12:44 7 screenshot for those.

10:12:45 8 Those were taken outside of the time frame

10:12:47 9 of the indictment. So those are from December 2022.

10:12:49 10 So we would object to those being included on that

10:12:51 11 basis, because they're not from the time frame of the

10:12:54 12 indictment.

10:12:54 13 We don't object to them on any other

10:12:57 14 basis, just that they're outside the time frame.

10:13:00 15 THE COURT: Okay. Well, one of them is

10:13:01 16 September 8, 2021. I can't see what page that is.

10:13:11 17 19.

10:13:15 18 MS. CORDOVA: Your Honor, I'm talking

10:13:16 19 about page 14 through -- 14 through 16. The

10:13:27 20 government produced this as an exhibit, a separate

10:13:30 21 exhibit. And the Wayback Machine banner at the top

10:13:34 22 shows that this was captured from December 2022.

10:13:37 23 And there are other captures during the

10:13:38 24 time frame of the indictment of that website. And we

10:13:44 25 would likely not object to those, but we would just

10:13:46 1 object to something that's outside the scope of the
10:13:52 2 indictment.

10:13:52 3 THE COURT: For the government?

10:13:54 4 Wait, wait. Find a mic.

10:14:06 5 MR. FLEITES: Good morning, Your Honor.

10:14:06 6 Carlos Fleites on behalf of Mr. Hrvatin.

10:14:07 7 Your Honor, as to Government Exhibit 1 as
10:14:09 8 it pertains to Mr. Hrvatin, it contains three
10:14:13 9 pictures. The one in the middle of Mr. Hrvatin, we
10:14:18 10 have no issue with. It's a picture of him.

10:14:20 11 The other two pictures are him and
10:14:23 12 Mr. Constantinescu taken on the same day. And there's
10:14:26 13 two issues with them.

10:14:27 14 First and foremost, the nature of the
10:14:30 15 picture, the one on the left and the caption that says
10:14:34 16 "SEC's most wanted," which was posted to
10:14:38 17 Mr. Constantinescu's -- I believe his Instagram
10:14:41 18 account. Mr. Hrvatin had no knowledge or say in that.
10:14:44 19 But it doesn't depict who posted it on either picture.
10:14:48 20 And it's also a picture of Mr. Hrvatin flipping the
10:14:52 21 camera the middle finger, not knowing what it was
10:14:54 22 going to be used for, not knowing the caption, and not
10:14:58 23 controlling it.

10:14:59 24 And all of that is very prejudicial to
10:15:00 25 Mr. Hrvatin as he had no control of it and it paints a

10:15:03 1 picture that they hung out all the time. These are
10:15:06 2 pictures from the same day, from the only time he was
10:15:09 3 physically in contact or physically visited -- or they
10:15:14 4 visited him, I should say, Mr. Constantinescu visited
10:15:17 5 Mr. Hrvatin in Miami.

10:15:18 6 It seeks to show that they hung out all
10:15:20 7 the time, everything. And that's not what the reality
10:15:22 8 of it is, insofar as it seeks to be a summary. It
10:15:26 9 does not do that.

10:15:34 10 MR. FORD: Just a couple quick things. If
10:15:36 11 you look at page 1, bottom line, it says: Francis
10:15:40 12 Sabo. Twitter handle, @RickyBobby. That's wrong.
10:15:45 13 His Twitter handle is DiabloRicky. The government
10:15:48 14 knows it. Later in our presentation today and the
10:15:53 15 next few days you'll see why this is relevant, but
10:15:56 16 they have put his wrong Twitter handle in. This is
10:16:04 17 immensely problematic.

10:16:06 18 With regards to the SEC stuff --

10:16:07 19 THE COURT: Why don't you preview for me
10:16:11 20 why the wrong Twitter handle is problematic.

10:16:13 21 MR. FORD: Well, because they submitted
10:16:15 22 dozens of purported summaries, which we're going to
10:16:17 23 discuss at length, where they list Francis Sabo and
10:16:22 24 then under his Twitter handle it's blank to suggest he
10:16:25 25 doesn't have a Twitter handle.

10:16:26 1 And then they put that he didn't tweet
10:16:28 2 about the stock when, in fact, through the Wayback
10:16:31 3 Machine, we were able to obtain his Diablo Ricky
10:16:34 4 @DiabloRicky tweets. And his statements that were
10:16:36 5 made during these relevant time periods about these
10:16:39 6 stocks.

10:16:42 7 So it's part and parcel with what is
10:16:45 8 either an unconscious accidental or intentional
10:16:49 9 obfuscation of Mr. Sabo's Twitter name and Twitter
10:16:55 10 activity. It is not @RickyBobby. He will testify to
10:17:00 11 that. The Twitter handle was @DiabloRicky.

10:17:00 12 The more critical point that I feel
10:17:03 13 compelled to address has to do with the SEC stuff.
10:17:05 14 The pictures it shows of my client have headings on
10:17:08 15 them mocking the SEC. Mr. Cooperman has one as well
10:17:11 16 where they're pretending to be arrested.

10:17:14 17 The joke here within the financial
10:17:17 18 community is that over the past few years the
10:17:21 19 Securities and Exchange Commission has become an
10:17:24 20 overly aggressive agency. And, in fact, they have
10:17:26 21 taken on a role outside of their congressional
10:17:30 22 authority, which is they cannot throw people in jail.
10:17:32 23 They don't have criminal authority.

10:17:34 24 However, you know, that seems to be --
10:17:38 25 what they're doing, driving what they're calling

10:17:41 1 parallel investigations.

10:17:44 2 Now, my client, Mr. Constantinescu, was
10:17:45 3 aware of this. It is a political belief he holds.
10:17:51 4 And so that is one of the things he did on the
10:17:53 5 internet in order to get his -- you know, to increase
10:17:57 6 his influencer status, was joke about the SEC and mock
10:17:59 7 the SEC.

10:18:00 8 I would not be surprised if it's part of
10:18:03 9 the reason we're here today. But the fact is, the
10:18:05 10 jury doesn't need to see it, because whether or not he
10:18:08 11 was joking or believed that he was violating some SEC
10:18:11 12 rule or regulation, which is what they're going to
10:18:13 13 suggest, it has no relevance to whether a crime was
10:18:16 14 committed.

10:18:17 15 So I think those exhibits, especially of
10:18:20 16 Mr. Cooperman sitting in the dog cage saying the SEC
10:18:24 17 got me, or my client on the beach in Mexico saying the
10:18:27 18 SEC finally got me, the jury does not need to see
10:18:30 19 them. They don't advance the case and they don't make
10:18:32 20 a fact more or less likely in this case.

10:18:35 21 As a general proposition, we agree with
10:18:37 22 Mr. Rybarczyk, these are not 1006 summaries. What it
10:18:41 23 is is a demonstrative and it's a misleading
10:18:43 24 demonstrative. So we would seek to have it excluded
10:18:45 25 on those grounds.

10:18:54 1 MS. EPLEY: On behalf of Mr. Cooperman,
10:18:56 2 Your Honor, we adopt the objections made by co-counsel
10:18:58 3 in regards to this --

10:18:59 4 THE COURT: Wait. Let me stop you right
10:19:01 5 there.

10:19:01 6 MS. EPLEY: Yes.

10:19:02 7 THE COURT: We don't need to do this. If
10:19:04 8 you've got something different to add --

10:19:06 9 MS. EPLEY: Well, in that case, Your
10:19:07 10 Honor, I was just going to direct --

10:19:09 11 THE COURT: We're going to be here till
10:19:11 12 5:00 in the morning and then start again at 9:00 if we
10:19:14 13 do this.

10:19:15 14 MS. EPLEY: Yes, Your Honor. Of course.

10:19:15 15 Then I would tell you it's page 12 on
10:19:17 16 Exhibit 1, the third picture, it's on the right. And
10:19:21 17 in addition to the other items, it's a picture taken
10:19:24 18 June 27th of '22, so also outside of the conspiracy
10:19:28 19 window and should be excluded for that reason as well.

10:19:39 20 THE COURT: Mr. Armstrong?

10:19:40 21 MR. ARMSTRONG: Judge, to now argue that
10:19:44 22 defendant's own statement is unduly prejudicial to
10:19:48 23 them when 99.999 percent of the content in
10:19:53 24 Government's Exhibit 1 is their own posts and their
10:19:57 25 own statements on social media is a little bit

10:20:00 1 farfetched.

10:20:02 2 These are literally their own statements.
10:20:04 3 And part of the scheme that they put forward was that
10:20:08 4 they vigorously contested and defended to the outside
10:20:13 5 world that they're not doing what they actually were,
10:20:16 6 in fact, doing.

10:20:17 7 And part of that is to mock the SEC and
10:20:19 8 say, ha, ha, the SEC is going to get me, but they're
10:20:23 9 not actually going to get me because I'm not doing
10:20:25 10 anything wrong; which, we're going to prove is
10:20:28 11 demonstratively not the case.

10:20:30 12 So these SEC references are important and
10:20:33 13 it's important because they were essentially rubbing
10:20:35 14 the regulator's nose in it and saying you guys aren't
10:20:40 15 going to catch us. Or if you are going to catch us,
10:20:43 16 nothing will stick because we're not doing anything
10:20:45 17 wrong. That is the image that they presented to their
10:20:48 18 followers. That is the image that they presented on
10:20:50 19 social media.

10:20:51 20 As far as the wealth aspect of it, zero
10:20:57 21 part of our presentation is going to be, jury, convict
10:21:00 22 these people because they're wealthy. That's not
10:21:03 23 going to be part of it. They know that. Your Honor
10:21:06 24 knows that. We're not going to be doing that.

10:21:07 25 What we are going to be presenting is that

10:21:09 1 the defendants held out their success and they held
10:21:12 2 out how they were able to enjoy the fruits of their
10:21:15 3 supposed success in order to pull in more followers
10:21:18 4 and have more followers start following them, have
10:21:21 5 more followers buying the stocks that they
10:21:24 6 recommended. So that was a critical part of the
10:21:26 7 scheme.

10:21:26 8 And that is what we're going to have
10:21:28 9 testimony to, both from co-conspirators but also
10:21:31 10 victim witnesses.

10:21:33 11 THE COURT: All right. To the extent -- I
10:21:39 12 guess this is an objection and we're really talking a
10:21:43 13 motion in limine here, I'm granting the motion in
10:21:45 14 limine with respect to the pictures referencing the
10:21:47 15 SEC and with respect to the pictures where someone is
10:21:54 16 flashing a less than savory middle finger.

10:22:03 17 But the rest of the objection I'm
10:22:03 18 overruling.

10:22:06 19 MS. CORDOVA: Your Honor, may I just note,
10:22:06 20 on page 12 there's a tweet from Mr. Constantinescu
10:22:09 21 that includes a picture of Mr. Hennessey. And
10:22:13 22 Mr. Constantinescu wrote: Two of America's most
10:22:15 23 wanted on there. I think he was joking, like we're
10:22:18 24 good-looking guys --

10:22:18 25 THE COURT: I'm including that one with

10:22:18 1 the SEC.

10:22:18 2 MS. CORDOVA: Okay. That one's out.

10:22:27 3 Thank you.

10:22:27 4 MR. FORD: By the way, Your Honor, that's
10:22:27 5 a lyric from a rap song. It's Snoop Dogg and he says
10:22:31 6 I "do it all legal," so...

10:22:42 7 THE COURT: Well, you'll have to keep me
10:22:43 8 up-to-date on those lyrics. My musical knowledge went
10:22:48 9 out in 1980.

10:22:48 10 MR. WILLIAMS: On that note, Your Honor,
10:22:51 11 do you think you would consider starting late the
10:22:53 12 Monday after the Rolling Stones concert?

10:22:57 13 THE COURT: I've actually seen the Rolling
10:23:00 14 Stones. So I know who they are.

10:23:04 15 MR. WILLIAMS: Just forewarning.

10:23:08 16 THE COURT: I live in constant amazement
10:23:10 17 that they're still alive. Or most of them are.

10:23:18 18 All right. 536 is also about
10:23:23 19 Mr. Rybarczyk's motion in limine to exclude hearsay
10:23:25 20 statements about him contained in government's
10:23:30 21 exhibits.

10:23:34 22 Primarily, there is a video that's at
10:23:40 23 issue here. And I think that's also raised in other
10:23:45 24 people's motions.

10:23:47 25 MR. ARMSTRONG: I'm sorry, Your Honor,

10:23:49 1 what number?

10:23:49 2 THE COURT: It's 536 docket number.

10:24:10 3 MR. ROSEN: Judge, we have a binder of the
10:24:12 4 exhibits that we were challenging. Do you want us to
10:24:14 5 bring this up to you? They're in chronological order
10:24:19 6 to go through if that would help make things easier.

10:24:22 7 THE COURT: It might. I mean, I have your
10:24:23 8 motion here.

10:24:36 9 MR. ROSEN: There are a few more that we'd
10:24:37 10 like to --

10:24:37 11 THE COURT: Okay. Why don't you hand me
10:24:38 12 the binder then?

10:25:05 13 MR. ROSEN: These pertain to a number of
10:25:07 14 the defendants. I'm going to speak solely for my
10:25:10 15 client, Mr. Rybarczyk. But, effectively, we've
10:25:13 16 reviewed the exhibits.

10:25:15 17 The government's attempting to prove its
10:25:17 18 case against my client primarily by relying on
10:25:21 19 out-of-court statements by other individuals for the
10:25:23 20 truth of the matter asserted and which lack nearly any
10:25:28 21 indicia of reliability or usefulness to the jury.

10:25:30 22 The government's use of hearsay should be
10:25:33 23 rejected in this case, as the statements both don't
10:25:37 24 fall under any exception to the hearsay rule. They
10:25:42 25 promote generally co-conspirator statements. They

10:25:45 1 don't show the existence of any conspiracy between
10:25:47 2 these people; largely, whom my client has not met or
10:25:52 3 met only, you know, very briefly. And they're
10:25:56 4 certainly not made in furtherance of any conspiracy.

10:26:00 5 Really, the only sort of ways to sort of
10:26:04 6 do this is to go through sort of each one sort of
10:26:09 7 separately, unfortunately. And I know there is a
10:26:12 8 number of them. But I'm happy to sort of start in --

10:26:17 9 There's really two issues: One are the
10:26:20 10 video statements where they're talking about various
10:26:24 11 things primarily related to a stock, GTT, which is in
10:26:29 12 the indictment.

10:26:30 13 And then a number of different text
10:26:33 14 message chains between various alleged co-conspirators
10:26:37 15 and non-co-conspirators that really demonstrate what
10:26:41 16 we believe to be -- we obviously deny that there's any
10:26:44 17 conspiracy at all, but to the extent that there even
10:26:47 18 is proven by any type of preponderance of the evidence
10:26:50 19 here, that it's multiple and -- multiple conspiracies
10:26:53 20 where people are simply pairing off into small groups
10:26:57 21 of traders discussing their sort of next move, and
10:27:01 22 certainly not in furtherance of any conspiracy which,
10:27:04 23 A, doesn't exist, but, B, which my client is a member
10:27:08 24 of.

10:27:09 25 To be clear, my client was part of

10:27:11 1 Sapphire Trading and not during the conspiracy Atlas
10:27:18 2 Trading. So we already have a very different ball
10:27:18 3 game.

10:27:19 4 But if you look at the transcript, for
10:27:20 5 example, the first page, 7(h), which is a transcript
10:27:23 6 of allegedly -- and I think it says Male One, I think
10:27:27 7 that's Mr. Cooperman, although the government can
10:27:30 8 correct me if I'm wrong. We were sort of going by the
10:27:33 9 voices on the video, but it's allegedly my client
10:27:37 10 texting Mr. Cooperman: GTT bottom chart.

10:27:47 11 THE COURT: So your client is Male One?

10:27:49 12 MR. ROSEN: No, my client is not in any of
10:27:51 13 these. He is an amorphous individual that was
10:27:56 14 allegedly texting someone saying: GTT bottom chart.

10:28:03 15 And GTT is one of the more interesting
10:28:05 16 stocks in this case because it was a subject of major
10:28:11 17 change at the time of these trades; meaning, that
10:28:15 18 there was a major player in the market who later filed
10:28:21 19 forms reporting this, selling approximately 4 million
10:28:23 20 shares over the course of three or four days. It was
10:28:26 21 some type of fund, whether a mutual fund or hedge fund
10:28:30 22 or something, and they filed the required report after
10:28:32 23 the sales. So there was huge volatility in this
10:28:36 24 market.

10:28:36 25 And as a result of that, things were

10:28:38 1 changing immediately. What we have here is the
10:28:42 2 government trying to concoct some type of
10:28:45 3 co-conspirator statement. But the fact is, even if
10:28:48 4 true, that Mr. Rybarczyk was texting GTT bottom chart,
10:28:53 5 he then tweeted that same thing out just, you know, a
10:28:58 6 minute or two after this. So he's texting people and
10:29:05 7 tweeting this same thing.

10:29:06 8 The core of the government's case is that
10:29:08 9 my client was lying in his tweets. So they'd have to
10:29:12 10 believe, in order to establish any type of
10:29:14 11 co-conspirator statement, that he was also lying to
10:29:17 12 his co-conspirators. But he wasn't.

10:29:21 13 GTT had plummeted from 60 to 2. If
10:29:25 14 that's not a -- we put the stock chart in our reply
10:29:29 15 brief. And if that's not a bottom chart, I don't know
10:29:31 16 what is.

10:29:33 17 So to the extent this thing is anything,
10:29:35 18 it's my client allegedly texting him a true statement
10:29:40 19 about a stock that he was tweeting about at that time.
10:29:45 20 There's nothing in furtherance of anything, despite
10:29:48 21 the government's attempt to concoct reasons for
10:29:51 22 linking it to -- to -- you know, any type of fraud.
10:29:57 23 It's not just -- it doesn't -- it's not just the fact
10:30:00 24 that these people are chattering. It's the fact that
10:30:03 25 it has to be in furtherance of a criminal conspiracy.

10:30:05 1 And that's where we're completely wrong.

10:30:07 2 7(i) is virtually the same thing. When
10:30:15 3 they're talking about -- when we lay -- the timeline
10:30:17 4 here is so critical that the government fails to
10:30:19 5 acknowledge, we lay this out in our reply brief. And
10:30:23 6 it was unfortunately hard to do it in less pages than
10:30:26 7 we took up.

10:30:27 8 But what was going on there is that when
10:30:30 9 Mr. Rybarczyk tweeted, the stock was virtually at its
10:30:33 10 bottom. However, as I was saying, because of the
10:30:35 11 volatility in the market, by the time -- and
10:30:38 12 Mr. Cooperman sort of laughing about this, the stock
10:30:41 13 is like rapidly increasing in price, huge green
10:30:46 14 candles, people are buying it. That's not a pump and
10:30:50 15 dump. That's what was going on in the market. And
10:30:55 16 he's laughing, he's making a joke. It's evident in
10:30:57 17 the video.

10:30:58 18 That's not -- I just don't understand how
10:30:59 19 this could be conceived of in furtherance of anything.
10:31:04 20 Because it's not a lie. He's joking around about this
10:31:08 21 stock that is about to skyrocket, has been
10:31:10 22 skyrocketing through nothing anyone is doing to it,
10:31:13 23 other than other forces in the market, which is,
10:31:15 24 again, why, you know, this case is very, very
10:31:18 25 different from the standard pump and dump.

10:31:26 1 7(j), and I think also this is
10:31:27 2 Mr. Cooperman. I apologize the names that -- are
10:31:30 3 there. But there's also a female who is not alleged
10:31:33 4 to be a co-conspirator.

10:31:34 5 So her statements cannot come in.

10:31:37 6 THE COURT: Who is Ultra?

10:31:42 7 MR. ROSEN: Ultra is the screen name for
10:31:44 8 my client, Mr. Rybarczyk.

10:31:46 9 So he is not, though -- and the transcript
10:31:51 10 is a little bit rough. This guy, Willy Meat Sauce, is
10:31:53 11 a -- not alleged to be a conspirator. Obviously, a
10:31:56 12 colorful name. But he says that, you know, this
10:32:01 13 Cooperman I think -- Knight, I think they're talking.
10:32:05 14 You know, Willy Meat Sauce is just getting a lot of
10:32:09 15 plays from Ultra too. Him and this guy MyZell are
10:32:14 16 getting a lot of gains during the day.

10:32:19 17 Again, there's nothing criminal about my
10:32:24 18 client, to the extent it's true, which I don't know if
10:32:28 19 it is or isn't. There's no indicia of any type of
10:32:31 20 reliability. It's overtly prejudice.

10:32:34 21 But everybody uses the word "plays." It
10:32:37 22 comes out on Twitter. It's public. A play is simply
10:32:41 23 a stock that they're talking about on Twitter. There
10:32:47 24 is nothing explicit about a play or anything like that.
10:32:49 25 It doesn't say him and Willy Meat Sauce have conspired

10:32:53 1 or are doing anything illegal.

10:32:54 2 It's two people talking about a past
10:32:56 3 narrative of what they think, with no evidence, my
10:33:00 4 client may or may not have done. And that's critical.
10:33:03 5 Because beyond even the co-conspirator exception is,
10:33:07 6 is there any indicia of reliability to these
10:33:10 7 statements? And these guys have no idea what my
10:33:15 8 client is doing and they make that clear in this text
10:33:21 9 message exchange.

10:33:21 10 7(m), 7(n), and 7(o) and -- do not
10:33:39 11 explicitly talk about my client. However, they are
10:33:42 12 statements regarding GTT. And, obviously, my client
10:33:47 13 is charged in those statements. They're singing about
10:33:50 14 GTT and things like that. Knight, at the bottom of
10:33:56 15 7(n), that transcript, he's saying: I am making it
10:33:59 16 look natural, you know, shares going in, shares going
10:34:02 17 out.

10:34:03 18 Again, my client had no idea what Knight
10:34:07 19 was doing. He wasn't texting with Knight about
10:34:10 20 anything. He wasn't part of what Knight is doing. He
10:34:15 21 certainly texted -- he tweeted about GTT truthfully.
10:34:19 22 And the government has not alleged otherwise, other
10:34:22 23 than this amorphous failed to disclose his intent to
10:34:28 24 sell, which is odd because he's a day trader.

10:34:31 25 But it's also overtly prejudice to have

10:34:34 1 someone who has come in, not part of a conspiracy,
10:34:38 2 pled guilty, testifying by his own statements, and
10:34:41 3 trying to link those back to a charged person who has
10:34:45 4 never spoken or dealt with him. It's extremely
10:34:48 5 problematic to the extent he needs a limiting
10:34:51 6 instruction or just should be excised from this case
10:34:56 7 entirely. Obviously, we leave that up to Your Honor.
10:34:58 8 But nothing here is based on any truth as to what my
10:35:02 9 client is doing.

10:35:02 10 And that's the problem. It's all sort of
10:35:05 11 reflecting on that in these next couple things. We've
10:35:08 12 already talked about the robbing idiots of their
10:35:11 13 money. And all of this is sort of part of this GTT --
10:35:17 14 part of these GTT conversations that are
10:35:21 15 extraordinarily prejudicial.

10:35:22 16 There is one more video. It's 7(r). It's
10:35:28 17 the last page. That explicitly uses the name Ultra.
10:35:33 18 And I think that's Mr. Cooperman. He says on that
10:35:37 19 page: We got to remember what these Ultra ones they
10:35:41 20 all do the same thing. They like spikes come down for
10:35:43 21 a second, then the scalpers get out, Gary gets out and
10:35:47 22 then it goes bookoo, is the word that he uses, sort of
10:35:52 23 loosely translated there. So -- and then he talks
10:35:56 24 about people alerting it after my client tweets about
10:36:01 25 it.

10:36:06 1 Again, this is a narrative of past --
10:36:08 2 alleged past -- you know, what happened in the past.
10:36:11 3 It serves nothing in furtherance of any conspiracy.
10:36:15 4 They're trying to elicit some type of confession from
10:36:18 5 my client through Mr. Cooperman.

10:36:21 6 They talk about scalpers getting out.
10:36:24 7 Those are legal scalpers, people who take short --
10:36:27 8 very short term gains constantly throughout the day.
10:36:27 9 There's nothing illegal about that.

10:36:34 10 They talk about things going bookoo. I
10:36:36 11 have no idea what bookoo means. Neither will the
10:36:36 12 jury.

10:36:40 13 And then they talk about minions
10:36:42 14 retweeting it. This is all speculation. And that's
10:36:44 15 the problem here. It's speculation about past acts
10:36:50 16 that serve no basis other than to unfairly unduly
10:36:53 17 prejudice my client for really no reason. He's not
10:36:56 18 part of this. And he shouldn't be subject to any of
10:36:58 19 this.

10:37:00 20 There is, you know, as we start getting
10:37:03 21 into the text messages and, you know -- I can go
10:37:06 22 through, you know, one by one, but they're sort of
10:37:12 23 mostly similar.

10:37:12 24 THE COURT: Let me stop you here. Because
10:37:14 25 if this is just objections to exhibits, I just want to

10:37:19 1 do that later when we're talking about exhibits.

10:37:24 2 But I will have to tell you, when we get
10:37:26 3 to that point, I mean, I'm going to need context. I
10:37:29 4 mean, transcripts and -- from you and the government.
10:37:34 5 You know, having me read something that says Male One,
10:37:38 6 Male Two, Female One, I mean, you know, it could be
10:37:41 7 people totally unrelated to the case. It could be
10:37:43 8 three of the alleged co-conspirators.

10:37:46 9 Well, not three, because I don't think we
10:37:48 10 have any female co-conspirators alleged, but unless --
10:37:53 11 is Francis a co-conspirator male or female?

10:37:57 12 MR. ROSEN: I think that is male.

10:38:02 13 THE COURT: Okay. Let me come back to
10:38:03 14 these.

10:38:04 15 MR. ROSEN: Okay.

10:38:07 16 THE COURT: Because it just makes more
10:38:09 17 sense to do them when we're doing exhibits.

10:38:11 18 MR. ROSEN: Can I leave the binder up with
10:38:13 19 you?

10:38:13 20 THE COURT: Yes, please.

10:38:50 21 Let me shift gears and go to the
10:38:52 22 government's motion in limine. I think we can move
10:38:57 23 faster doing it that way.

10:39:02 24 Because I see in a lot of ways these are
10:39:07 25 really more classical motions in limine, as opposed to

10:39:10 1 objections to certain exhibits.

10:39:12 2 So I'm looking at Document 538. The first
10:39:23 3 one I see is the government -- the Court should
10:39:28 4 preclude evidence and argument aimed at jury
10:39:32 5 nullification, which in general I would grant, except
10:39:40 6 how do I enforce that? And what constitutes jury
10:39:45 7 nullification without having seen it or heard it?

10:39:51 8 Who wants to address that for the
10:40:03 9 government?

10:40:04 10 MR. LIOLOS: John Liolos.

10:40:06 11 THE COURT: In theory, you're right.

10:40:08 12 MR. LIOLOS: But I think you get
10:40:10 13 the thrust of the point. A lot of our motions in
10:40:11 14 limine are to lay out sort of general principles that
10:40:14 15 can then be applied throughout this case. And a
10:40:15 16 perfect application of this one are photographs that a
10:40:18 17 lot of the defendants have offered as exhibits.

10:40:21 18 For example, I believe it's
10:40:21 19 Mr. Cooperman's first exhibit is a montage of
10:40:25 20 photographs of -- I think it's his fiancée, pregnant,
10:40:31 21 a sonogram picture. There's all sorts of family
10:40:33 22 photographs of the different defendants that have no
10:40:36 23 relevance to this case that are trying to interject
10:40:40 24 consequences of conviction. Those types of jury
10:40:45 25 nullification arguments.

10:40:47 1 Another manifestation of jury
10:40:49 2 nullification argument is the repeated effort to bring
10:40:50 3 in the First Amendment, which they said in their
10:40:52 4 response. First Amendment has no application to this
10:40:55 5 case. Either the factual questions the jury has to
10:40:58 6 decide is whether defendants did the things alleged
10:41:01 7 and met the elements of the crime. If it's fraud,
10:41:04 8 First Amendment doesn't shield it. If it's not fraud,
10:41:08 9 you're free to go. There should be no mention of the
10:41:11 10 First Amendment before the jury.

10:41:12 11 THE COURT: I'm not going to grant this.
10:41:14 12 But I -- obviously, if something comes up during trial
10:41:16 13 that you think constitutes jury nullification, I'll
10:41:19 14 listen to any kind of objection to it. I mean, but --
10:41:27 15 you know, somebody's going to have to convince me that
10:41:29 16 a picture of his pregnant girlfriend is somehow
10:41:32 17 relevant.

10:41:34 18 MR. ARMSTRONG: I think the only marker
10:41:35 19 that we would just want the Court to be aware of is
10:41:36 20 opening statements. You know, if something gets
10:41:39 21 flashed up like that during opening, the cat is kind
10:41:41 22 of out of the bag.

10:41:42 23 And so to the extent that they plan to
10:41:44 24 introduce pictures like that, or show pictures like
10:41:46 25 that during opening, some guidelines --

10:41:49 1 THE COURT: No, I'm aware of that. And I
10:41:50 2 know that's one of the reasons they were worried about
10:41:52 3 your montage too.

10:41:55 4 MR. ARMSTRONG: We're not going to use the
10:41:57 5 montage in opening.

10:41:59 6 THE COURT: Okay. All right.

10:42:03 7 The next, evidence of good conduct,
10:42:07 8 including stock trades. What exactly are we trying to
10:42:11 9 get to there?

10:42:13 10 MR. ARMSTRONG: So as Your Honor knows,
10:42:14 11 we've excised a lot of the trading episodes in this
10:42:21 12 case. And what we are ironically now facing is that
10:42:26 13 after we've done that, the defendants want to dump in
10:42:29 14 reams of other trades that are not at issue that we
10:42:33 15 are not going to be contesting at trial have false and
10:42:36 16 misleading statements in them.

10:42:40 17 And so, at least from our perspective, the
10:42:41 18 purpose of that kind of evidence is to show that they
10:42:45 19 weren't committing fraud, right. And it's to show,
10:42:48 20 hey, I didn't do this or that on this other occasion,
10:42:53 21 therefore, I didn't commit fraud as to the charged
10:42:56 22 conduct.

10:42:56 23 And that's impermissible under Rule 405.
10:43:00 24 405 says that you can only prove character, you can
10:43:04 25 only prove the lack of intent through reputation or

10:43:07 1 opinion. You cannot prove other specific acts to show
10:43:11 2 that you didn't commit the crimes charged.

10:43:14 3 And the *Marrero* case that we cite on this
10:43:16 4 point from the Fifth Circuit is directly on point. It
10:43:19 5 comes up a lot of times in the healthcare fraud
10:43:22 6 context, where you try to prove, hey, I didn't commit
10:43:27 7 fraud on these other claims; therefore, the things I
10:43:30 8 am charged are not fraudulent as well.

10:43:30 9 THE COURT: Okay. I'm going to grant that
10:43:32 10 generally, but with this caveat. Obviously, the
10:43:36 11 defendants can -- I expect to hear and I think it's --
10:43:39 12 you know, that we're stock traders, we win some, we
10:43:44 13 lose some. You know, we've lost money doing this
10:43:47 14 trade. We made money doing this one.

10:43:49 15 I mean, I think generally, you know, they
10:43:54 16 can -- when it's their turn, they can talk about --
10:43:57 17 assuming they testify -- what they, you know -- what
10:44:03 18 their business is. I'm not excluding background as to
10:44:06 19 their business and what they do.

10:44:08 20 So having said that, I agree with the
10:44:10 21 concept that you -- just because you're a Boy Scout on
10:44:15 22 one occasion doesn't mean you're not nefarious on
10:44:19 23 another.

10:44:26 24 Okay. In the same -- I'm going to grant
10:44:26 25 the irrelevant character evidence also for the same

10:44:29 1 reason.

10:44:34 2 The next one would be attempts to blame
10:44:40 3 witnesses for defendants' fraud. And I guess help me
10:44:49 4 with what you mean there, because I --

10:44:52 5 MR. ARMSTRONG: Sure. So the defendants,
10:44:54 6 as we've charged in the indictment and as we're going
10:44:57 7 to prove at trial, dumped reams and reams and reams of
10:45:01 8 false statements into the market. They dumped reams
10:45:05 9 and reams of false statements in front of their
10:45:07 10 followers for the precise purpose of having their
10:45:09 11 followers buy the stock, so the price would go up at
10:45:14 12 an artificial level and then sell.

10:45:16 13 And so a lot of times what happens in
10:45:18 14 these, no bones about it, these pump-and-dump-type
10:45:22 15 behavior in these schemes, is that after the
10:45:25 16 defendants moved on, after they sold their shares,
10:45:28 17 after they stopped posting about the stock, the stock
10:45:32 18 craters. It just drops off the face of the Earth.

10:45:35 19 And a lot of times their followers would
10:45:38 20 complain and they would kind of attack them and say
10:45:41 21 you guys are just pump and dumpers. You guys are just
10:45:44 22 coordinating behind the scenes, which, of course, they
10:45:46 23 were, and you guys are just coordinating your tweets
10:45:49 24 so that you guys can then sell your shares, which of
10:45:52 25 course they were.

10:45:52 1 And so what the defendants did a lot of
10:45:54 2 times in response is that they would then say, oh,
10:45:57 3 well, you guys take profits, all you followers, you
10:46:01 4 guys should be taking profits. You guys should be
10:46:03 5 trading your own plan. You guys should be watching
10:46:06 6 out for your own behinds and taking responsibility for
10:46:10 7 your own trades.

10:46:12 8 And that is the classic victim blaming,
10:46:14 9 because it does nothing to negate the false statements
10:46:18 10 that they put into the market with the express intent
10:46:20 11 to falsely induce other people to buy.

10:46:23 12 And the Fifth Circuit pattern has a
10:46:25 13 precise sentence or two under wire fraud on this exact
10:46:30 14 point about how the victims' negligence, or what have
10:46:37 15 you, is not relevant to actually proving the falsity.

10:46:41 16 And so that's what they're going to try to
10:46:42 17 do. It's all over their exhibit lists. Time and time
10:46:45 18 again they're claiming in a self-serving manner, hey,
10:46:49 19 if you guys lost money, that's your own fault, because
10:46:52 20 you didn't take profits, even though I knew you were
10:46:54 21 buying this stock at a high level because of my tweet.

10:47:01 22 THE COURT: Well, aren't you going to -- I
10:47:07 23 mean, as a general proposition, I understand the
10:47:13 24 blaming the victim is not generally admissible, but if
10:47:20 25 you guys are going to say -- "you guys" being the

10:47:23 1 government -- these people bought because of the
10:47:29 2 representations of the defendants, and I don't know
10:47:34 3 what the facts are, you guys know what the facts are.

10:47:38 4 I mean, did defendants ever recommend they
10:47:39 5 sell it and somebody kept it? I mean, that seemingly
10:47:45 6 would be their fault.

10:47:47 7 MR. ARMSTRONG: So a lot of times what
10:47:49 8 happened, Your Honor, is the defendants would say, I'm
10:47:52 9 swinging a stock. "Swinging" means I'm in it for any
10:47:56 10 indeterminate amount of time, but a long period of
10:47:59 11 time. And oftentimes when they say I'm swinging a
10:48:03 12 stock, they would anchor that statement to news or
10:48:05 13 some kind of information that was weeks down the line.

10:48:05 14 THE COURT: Right.

10:48:06 15 MR. ARMSTRONG: Or I'm swinging for this
10:48:08 16 price target. I'm going to hold it to that price
10:48:10 17 target. And a lot of times, what would happen is that
10:48:13 18 they would sell seconds or a minute after a message
10:48:16 19 like that.

10:48:17 20 And so, to Your Honor's point, they were
10:48:20 21 inducing people to buy and hold for a long period of
10:48:24 22 time, saying, hey, this is what I'm doing, I'm a
10:48:27 23 successful trader, you guys should all, you know, take
10:48:32 24 notice.

10:48:32 25 And so they are fraudulently inducing

10:48:36 1 people to buy and hold for a long time when they're
10:48:39 2 selling for a short period of time. And then when the
10:48:41 3 price craters, they're saying, oh, well, I told you
10:48:44 4 guys you should, you know, follow your own plan or you
10:48:48 5 guys should have taken profits, or something like
10:48:50 6 that, which is blaming the victim for following their
10:48:52 7 bad advice.

10:48:53 8 MS. EPLEY: Your Honor, I thought if I let
10:48:55 9 Mr. Armstrong go long enough, he might help me make my
10:48:58 10 point and he has.

10:48:59 11 The examples he gave you at the start
10:49:00 12 about take profits and trade your own plan are
10:49:03 13 predicated predominantly in Tommy Cooperman's
10:49:05 14 exhibits.

10:49:06 15 But by the conclusion, what Mr. Armstrong
10:49:09 16 used as a reference point was, and, therefore, they
10:49:12 17 used this to induce people to hold it a long time,
10:49:15 18 which is objectively false.

10:49:16 19 Tommy Cooperman's entire trading strategy
10:49:19 20 is to hold it for mere minutes, multiple times a day.
10:49:23 21 He himself takes small, marginal, low-percentage
10:49:26 22 profits routinely, and tells everyone who follows him
10:49:30 23 multiple times a day, for months, if not years, to
10:49:34 24 take profits, that 5 percent is more than enough. If
10:49:37 25 you're green, don't let a winner become a loser. That

10:49:40 1 there's no reason to stay in these stocks long term.

10:49:42 2 Over and over and over.

10:49:43 3 And so if the government is going to say
10:49:45 4 him not telling people that he sold is somehow
10:49:48 5 relevant, so is the rest of this. I mean, in addition
10:49:51 6 to multiple other reasons it's relevant.

10:49:54 7 MR. ARMSTRONG: Your Honor, that's not
10:49:56 8 what the evidence is going to be.

10:49:57 9 THE COURT: Well, I mean, you're asking me
10:49:58 10 to prejudge evidence I haven't heard. And there's no
10:50:01 11 way I can do that.

10:50:04 12 MS. EPLEY: Yes.

10:50:07 13 THE COURT: I'm not going to grant this
10:50:10 14 because I don't know the context that the evidence is
10:50:15 15 going to come out. But it's not -- I mean, I would
10:50:18 16 assume, if you're one of the victims and you bought
10:50:23 17 because they said, well, I'm holding it until they
10:50:26 18 said to sell it and they never said to sell it. You
10:50:33 19 know, there could be a lot of responses to that.

10:50:35 20 So I'm not granting this as a motion in
10:50:36 21 limine, but I'm not saying I won't sustain an
10:50:39 22 objection when it comes up.

10:50:43 23 MR. ARMSTRONG: Thank you, Judge.

10:50:43 24 MR. REYES: Your Honor, if I may approach
10:50:44 25 for a second.

10:50:49 1 This is Luis Reyes for PJ Matlock.

10:50:51 2 I just wanted to add some context to this
10:50:53 3 in case it comes up again, Your Honor. I think it's a
10:50:57 4 little bit of a misnomer to say what they're trying to
10:51:00 5 do is limit blaming the victims. What they're really
10:51:03 6 trying to do, Your Honor, is limit contemporaneous,
10:51:08 7 exculpatory evidence in a different sequence.

10:51:11 8 It's information that the defendants
10:51:14 9 disclosed before the victims ever took part in Atlas
10:51:18 10 site. It's information that was in the rules. Do not
10:51:20 11 take our posts as signals to buy. Things like that.
10:51:24 12 And I believe what they're saying at one point was
10:51:28 13 that these aren't relevant.

10:51:30 14 But, of course, Your Honor, it goes to the
10:51:31 15 very heart of the matter of this case, which is the
10:51:36 16 posts that our defendants made and the effects they
10:51:38 17 had on listeners. It's not hearsay either, Your
10:51:42 18 Honor, because, first of all, they're imperative
10:51:43 19 statements. They're not declarative statements.
10:51:44 20 They're orders; do not do this, do not do that.

10:51:50 21 To the extent that we say we're not
10:51:52 22 financial advisors, well, those aren't offered for a
10:51:55 23 hearsay purpose. They're not offered for the fact of
10:51:57 24 the matter asserted. They're actually offered for the
10:52:00 25 fact that they were asserted. And they're not

10:52:02 1 claiming an authenticity objection.

10:52:04 2 So to the extent that this comes up,
10:52:05 3 again, Your Honor, I just wanted to put some context
10:52:07 4 that the universe and the mix of information that is
10:52:10 5 out there for the public to hear and see that was
10:52:12 6 given by the defendants is definitely relevant and
10:52:17 7 should be included.

10:52:18 8 And the last thing I'll say, Your Honor,
10:52:19 9 is they're trying to say, hey, our guys were saying
10:52:22 10 don't jump in the deep end. But they were also
10:52:25 11 saying -- excuse me.

10:52:25 12 They're trying to say our guys come jump
10:52:27 13 in the deep end of the pool, but were also saying,
10:52:30 14 don't jump into the deep end of the pool. They can't
10:52:32 15 have one and not the other.

10:52:34 16 And with that, Your Honor, I just wanted
10:52:36 17 to provide that context.

10:52:40 18 THE COURT: All right. Next one is the
10:52:42 19 FINRA reports. And I'm going to skip those and come
10:52:45 20 back to those when we talk about the actual documents.

10:52:51 21 Number 6 for the government is attempts to
10:52:54 22 introduce inadmissible hearsay. I will grant that.

10:53:03 23 The Court should -- the next one, 7, is
10:53:11 24 the Court should preclude hearsay attempting to
10:53:13 25 disclaim liability for fraud.

10:53:16 1 I mean, are we talking the disclaimers
10:53:19 2 that we've already seen in court?

10:53:21 3 MR. ARMSTRONG: That's definitely a type
10:53:24 4 of statement that we're talking about. The other
10:53:28 5 disclaimers are disclaimers that are supposedly at
10:53:32 6 some point in time on, like, the Twitter handles as
10:53:36 7 well. Saying like, these are my opinions, things like
10:53:38 8 that.

10:53:40 9 I think that we laid out in our motion
10:53:42 10 that these types of disclaimers are not admissible and
10:53:45 11 they're not relevant, because reliance is not an
10:53:50 12 element of the offense in this case. And so I think
10:53:55 13 we'll rest on our papers on that one.

10:53:56 14 THE COURT: Why wouldn't it go to
10:53:58 15 materiality?

10:53:59 16 MR. ARMSTRONG: Because --

10:54:00 17 THE COURT: If I'm saying don't rely on
10:54:02 18 what I'm saying, isn't the definition of materiality
10:54:06 19 something that you would make a decision based upon?

10:54:08 20 MR. ARMSTRONG: So, Your Honor, on that
10:54:09 21 one, I'm going to punt to Mr. Liolos, who is our
10:54:12 22 materiality expert.

10:54:14 23 MR. LIOLOS: Expert's generous.

10:54:17 24 But the materiality question is -- looks
10:54:22 25 at the intrinsic qualities of the statement. And it

10:54:25 1 doesn't look at the surrounding context. The Fifth
10:54:29 2 Circuit is pretty clear on this in an *Evans* case.
10:54:35 3 Give me a moment.

10:54:37 4 The Court's indulgence.

10:54:39 5 So in *United States versus Evans*, the
10:54:41 6 Fifth Circuit in 2018 explained how the test focuses
10:54:44 7 on the intrinsic qualities of the statement itself and
10:54:48 8 transcends the immediate circumstances in which it's
10:54:51 9 offered.

10:54:52 10 And the Court goes on to describe an
10:54:53 11 example of a crazed man demanding to see a patient
10:54:57 12 being kept under guard by federal agents makes a
10:55:01 13 materially false statement when he tells the agents
10:55:03 14 that he's the patient's lawyer.

10:55:05 15 So even the circumstances -- even though
10:55:07 16 the circumstances dispel any chance the agents might
10:55:10 17 buy the lie, the representation that one is a lawyer
10:55:17 18 is the type that would naturally tend to influence --
10:55:17 19 or is capable of influencing the decision-maker.

10:55:20 20 So in looking at the materiality of a
10:55:22 21 specific statement, you look to the intrinsic
10:55:24 22 qualities of the statement. For example, in a price
10:55:26 23 target example, if a stock is trading at \$2 and a
10:55:30 24 defendant says, hey, this is going to 50, divorced of
10:55:35 25 all context, that statement itself is something that

10:55:37 1 could influence someone who's interested in trading
10:55:40 2 the stock.

10:55:40 3 THE COURT: Okay. But let's say that
10:55:42 4 statement is right under a posting that says, you
10:55:47 5 know, use your own judgment, don't buy what I buy.
10:55:51 6 Why wouldn't that be a fact issue for the jury then?

10:55:54 7 MR. LIOLOS: So under the *Evans* --

10:55:56 8 THE COURT: So it's a representation or
10:55:57 9 promise is material if it has a natural tendency to
10:56:01 10 influence, that may have a natural tendency to
10:56:03 11 influence. If somebody said I'm giving you my
10:56:07 12 opinion, but I wouldn't rely on it if I were you.

10:56:11 13 MR. LIOLOS: I think the *Evans* example
10:56:13 14 hits that square on the head when it points out that a
10:56:15 15 crazed man saying I'm a lawyer, let me see the
10:56:17 16 patient, it doesn't matter that he's crazed and that
10:56:20 17 most people would see that. It just matters that I'm
10:56:22 18 a lawyer, let me see the patient.

10:56:27 19 Another angle on this is that these
10:56:27 20 disclaimers don't actually disclaim the falsity of the
10:56:31 21 statements that we're talking about, right? These
10:56:36 22 general statements trying to disclaim a general fraud
10:56:38 23 saying, oh, don't jump in the deep end of the pool,
10:56:41 24 but they're in the deep end of the pool and the
10:56:43 25 water's warm and it's great, I just didn't tell you

10:56:45 1 there's sharks under here. It doesn't talk about the
10:56:48 2 specific statement.

10:56:48 3 THE COURT: Yeah, I'm not granting that.
10:56:50 4 I think it's a fact issue for the jury.

10:56:55 5 I mean, I don't see how you can say, I can
10:56:57 6 only present one side of the facts and not the other
10:57:00 7 and then say it's a jury issue. It's -- the jury gets
10:57:03 8 to hear it. These disclaimers, if they believe them,
10:57:09 9 in the context that you just said, I mean, I'm sure
10:57:11 10 your witnesses are going to say, hey, you know, yeah,
10:57:16 11 they had this disclaimer but they also said X, Y, and
10:57:21 12 Z.

10:57:21 13 Yeah. I'm not ruling as a matter of law
10:57:23 14 that disclaimer gets the defendants off, but I am
10:57:27 15 saying it's a fact issue for the jury.

10:57:30 16 MR. LIOLOS: What about the notion that
10:57:31 17 it's hearsay that goes to the veracity --

10:57:33 18 THE COURT: Well, they've got to prove it
10:57:34 19 up. I mean, I'm not saying -- this is a motion in
10:57:36 20 limine, though, you're saying they can't bring it up.
10:57:38 21 I'm saying, if they can prove it, then that's a
10:57:42 22 different story.

10:57:43 23 MR. LIOLOS: So just, for clarity, I mean,
10:57:45 24 there needs to be some foundation that it's not
10:57:47 25 hearsay and establish that?

10:57:48 1 THE COURT: Yeah.

10:57:48 2 MR. LIOLOS: Okay.

10:57:49 3 THE COURT: I'm not admitting it. I'm

10:57:51 4 just saying that I'm not granting the motion in

10:57:53 5 limine.

10:57:53 6 MR. LIOLOS: Understood. Thank you.

10:57:55 7 MR. FORD: Your Honor, if I may quickly on

10:57:56 8 this. I need to clarify something for my client's

10:57:58 9 perspective.

10:58:00 10 The disclaimer language would -- my client

10:58:04 11 would do on Twitter, I will just tell you, he was a

10:58:05 12 highly successful trader. We'll see evidence of him

10:58:09 13 making millions and millions of dollars trading stocks

10:58:12 14 like Tesla, American Airlines, Carnival Cruise Line,

10:58:15 15 at a time when he didn't have very many followers.

10:58:18 16 He uses his success to then build up his

10:58:21 17 sort of social media influencer status. That's the

10:58:23 18 sequence of events. It's undeniable. When he's doing

10:58:25 19 that, he seeks to give sort of advice and then also

10:58:31 20 warnings about what he's doing.

10:58:33 21 It goes to his intent. So, for example,

10:58:35 22 when my client repeatedly posts on his Twitter page, I

10:58:41 23 don't post exits or I don't post sales of my stocks,

10:58:45 24 it goes to his intent as to whether or not he was

10:58:48 25 seeking to deceive them at all in the first instance.

10:58:51 1 I just want to clarify -- and I appreciate
10:58:53 2 Your Honor's ruling on materiality. But when we
10:58:56 3 introduce these sort of rules of the road and warnings
10:58:59 4 that he puts, hey, if you want to, you know, see how
10:59:02 5 I'm doing what I'm doing, we're going to also be using
10:59:05 6 it for the intent element.

10:59:07 7 THE COURT: Okay.

10:59:13 8 MR. ARMSTRONG: So, Your Honor, I mean,
10:59:17 9 rabbit holes just keep popping up everywhere. And
10:59:19 10 that's a good examples. Like a lot of those examples
10:59:20 11 that he just referenced are self-serving hearsay to
10:59:23 12 prove intent.

10:59:24 13 THE COURT: Well, first of all, let's take
10:59:26 14 out the hearsay part. I'm not ruling on
10:59:28 15 admissibility. If it's hearsay, they're not going to
10:59:32 16 get it in, unless they have a way to prove it up.

10:59:36 17 And, you know, they're going to have to --
10:59:38 18 if it's a dis -- somebody is going to have to prove up
10:59:40 19 it's on his website or someone is going to have to
10:59:43 20 prove up I do this every time. I mean, I don't know.
10:59:45 21 You're asking me to prejudge evidence I haven't seen.

10:59:49 22 But if it is what he just represented it
10:59:53 23 was, that may go to intent. It may show his intent
10:59:58 24 that, hey, I wasn't trying to rip these people off.

11:00:03 25 You know, we just talked about intent to

11:00:06 1 deprive people of money or property. I mean, if he's
11:00:11 2 saying, I told you to buy it, but I never post my
11:00:16 3 sales, you know, that's a pretty good warning that
11:00:23 4 you've got to figure out when to sell it yourself on
11:00:26 5 one hand.

11:00:27 6 On the other hand, if you've got evidence
11:00:28 7 that says buy it, and oh, by the way, I'm holding this
11:00:33 8 for next four months and he sells it before the
11:00:36 9 computer keyboard even gets cold, that's pretty good
11:00:41 10 evidence that he did intend to sell.

11:00:45 11 MR. ARMSTRONG: Thank you, Judge.

11:00:50 12 THE COURT: The Court should preclude
11:00:52 13 evidence and the argument about the success or lack
11:00:55 14 thereof of the fraudulent scheme because success of
11:00:57 15 the scheme is not required.

11:01:09 16 I'm having problems with this one. I
11:01:10 17 mean, it's the government's position that these guys
11:01:12 18 had all these followers because they were so
11:01:15 19 successful and kept putting on -- in fact Government's
11:01:19 20 Exhibit Number 1 has pictures of how successful they
11:01:22 21 are. And if you did -- if I grant this, I'm
11:01:25 22 precluding Government's Exhibit 1.

11:01:40 23 MR. LIOLOS: Judge, the thrust of this is
11:01:41 24 essentially that it goes hand in hand with the concept
11:01:45 25 of other specific trades or saying, hey, I lost money

11:01:49 1 in some other instances so, you know, we couldn't have
11:01:51 2 had a scheme here.

11:01:53 3 The focus should be on the scheme itself.
11:01:59 4 And this is just to put guardrails on a bunch of other
11:02:06 5 concepts coming in trying to distort the focus on what
11:02:11 6 is and isn't being alleged here. And it's that they
11:02:13 7 sought in the specific instances to conduct a
11:02:16 8 fraudulent scheme.

11:02:17 9 So the focus on them, you know, losing
11:02:19 10 money in other instances and saying, hey, you know, I
11:02:24 11 couldn't have been conducting the scheme in the
11:02:25 12 instances that are alleged because I lost money on
11:02:28 13 other stocks, it's just not relevant to what we're
11:02:31 14 talking about.

11:02:33 15 Now, granted, within those instances,
11:02:36 16 right, whether they made or lost money goes to motive.
11:02:38 17 So that should come in. But the concept here is just
11:02:42 18 to put the focus on, A, the scheme itself to which
11:02:46 19 liability attaches, not its outcome; and, B --

11:02:54 20 THE COURT: I think we're going to have to
11:02:56 21 go witness by witness -- I mean, exhibit by exhibit.

11:02:57 22 MR. LIOLOS: Agreed. I think this is an
11:02:58 23 example of just sort of laying out the principles of
11:03:00 24 the fraud law and then it can be applied as we go.
11:03:03 25 Thank you, Judge.

11:03:07 1 THE COURT: All right. The next one is
11:03:09 2 the Court should preclude irrelevant evidence. I
11:03:13 3 grant that.

11:03:16 4 Okay. The SEC's report, we're going to
11:03:20 5 take that up when we take up the FINRA exhibits and
11:03:24 6 the SEC's.

11:03:26 7 MR. FORD: Your Honor, on that one, I
11:03:28 8 don't know if other people are planning on introducing
11:03:31 9 it. We are not planning on talking about it at trial.

11:03:34 10 THE COURT: Okay. Well, when we get to
11:03:37 11 that, let's --

11:03:42 12 Okay. The next one I think is -- we do
11:03:47 13 need to address. The Court should preclude evidence
11:03:51 14 and arguments that defendants hoped their followers
11:03:53 15 would make money on the stocks.

11:04:00 16 I mean, I'm sure they're going to -- we're
11:04:03 17 going to have testimony that says that. Why would I
11:04:07 18 preclude that?

11:04:10 19 MR. LIOLOS: So the thrust of this, Judge,
11:04:15 20 is it's similar to sort of disclaiming away the
11:04:19 21 specific content, right. The fraud cases show that
11:04:24 22 you can't say I'm going to commit this fraud, I want
11:04:28 23 the money from it, oh, but I hope it works out down
11:04:32 24 the road for you. Or I hope you recoup your gains
11:04:35 25 down the line, even though in this specific instance

11:04:37 1 right now I'm telling you something false and
11:04:39 2 misleading to get the money and hit the road.

11:04:42 3 But general hopes, wishes, oh, you know,
11:04:45 4 down the road, a few months later maybe it'll come
11:04:49 5 back --

11:04:49 6 THE COURT: Isn't one of the things we
11:04:50 7 just talked about is you're going to have to prove
11:04:53 8 their intent to take money or property?

11:04:59 9 MR. LIOLOS: Indeed. And if it goes to
11:05:01 10 that specific statement --

11:05:02 11 THE COURT: But you're saying they can't
11:05:03 12 say, you know -- Mr. Constantinescu can't take the
11:05:08 13 stand and they say, did you intend to take money or
11:05:10 14 property, he can't say no?

11:05:13 15 MR. LIOLOS: I think, again, this is a
11:05:15 16 difficult one when it's divorced from the context,
11:05:17 17 right.

11:05:19 18 But you can't say I'm going to say
11:05:23 19 something -- I'm going to hold this stock until it
11:05:26 20 hits 50, ten seconds later I'm selling at \$3. Oh, by
11:05:31 21 the way, a week later, I hope you guys made money on
11:05:34 22 that. It doesn't disclaim away the material falsity
11:05:38 23 of the statement at issue.

11:05:42 24 THE COURT: Okay. I'm going to overrule
11:05:43 25 that.

11:05:44 1 MR. LIOLOS: Thank you, Judge.

11:05:45 2 THE COURT: Number 12, the Court should
11:05:47 3 preclude evidence and argument about prosecutorial
11:05:55 4 decisions decisions. I mean, I'm going to grant
11:06:01 5 that in its motion in limine form. Which, of course,
11:06:04 6 means if you want to bring it up, you're going to have
11:06:06 7 to approach the bench. But individual decisions on
11:06:11 8 questioning the prosecutors' decisions, I'm granting
11:06:14 9 that as a limine motion.

11:06:17 10 Okay. Here's -- I'm a little worried
11:06:26 11 about the breadth of this one. 13 is preclude all
11:06:30 12 evidence and argument about the conduct/misconduct of
11:06:32 13 other uncharged individuals.

11:06:38 14 And we just a minute ago went through a
11:06:44 15 series of text messages that I assume are government's
11:06:48 16 exhibit that talk about other individuals. I mean, we
11:06:53 17 have unknown females and unknown males.

11:07:02 18 So if I grant this, that would rule out
11:07:05 19 your exhibit.

11:07:10 20 MR. FORD: Your Honor, we're seeking to
11:07:11 21 exclude all of their documents. I think everybody on
11:07:13 22 this side, where they bring in people who we don't
11:07:19 23 know who they are. So to the extent you're inclined
11:07:22 24 to grant this motion in limine, it would be the only
11:07:25 25 time we're in 100 percent agreement.

11:07:28 1 MR. ARMSTRONG: Your Honor, I think
11:07:29 2 that -- the example that you gave is not the gist of
11:07:32 3 what we're getting at here.

11:07:34 4 The gist of what we're getting at here is
11:07:37 5 just argument that there are other people out there
11:07:40 6 that haven't been charged. And, therefore, those
11:07:43 7 people are more righteous targets and, therefore, you
11:07:46 8 should find our defendants not guilty. That's the
11:07:49 9 gist of the kind of argument that we're seeking to
11:07:52 10 preclude as far as a guardrail that Your Honor --

11:07:56 11 THE COURT: All right. That argument I
11:07:58 12 will grant as a motion in limine.

11:08:02 13 Next one is the Court should preclude
11:08:03 14 evidence and argument about the novelty of the
11:08:06 15 charges.

11:08:10 16 Are we expecting any of that? Okay. I'm
11:08:13 17 going to grant that.

11:08:24 18 MR. ROSEN: Your Honor, if I may be heard
11:08:26 19 for a second on that. It's not the thrust of any main
11:08:31 20 argument or anything like that. But they are
11:08:33 21 presenting a witness, Peter Melley from FINRA, who
11:08:37 22 will be testifying purportedly as an expert in what a
11:08:41 23 pump and dump scheme is.

11:08:42 24 We're obviously moving to preclude that.
11:08:45 25 We'll address that later when Your Honor wants us to.

11:08:47 1 But we do think, to the extent that he
11:08:48 2 gets that in, we should be allowed to question him on
11:08:51 3 cross about the novelty of these particular charges
11:08:54 4 not being a traditional pump and dump, as we've sort
11:08:58 5 of echoed throughout the case. That's the only --

11:09:00 6 THE COURT: "Novelty" being that it
11:09:02 7 traditionally involves corporate insider people type?

11:09:08 8 MR. ROSEN: Corporate insiders, people who
11:09:09 9 disguise their ownership or control, people working
11:09:13 10 together, match trading, wash trading, all the
11:09:17 11 indicia -- he is planning to testify, apparently,
11:09:18 12 about indicia of a pump and dump.

11:09:20 13 So we should be able to cross-examine him
11:09:22 14 and say match trading was not present here, wash
11:09:25 15 trading was --

11:09:25 16 MR. FORD: People who state things false
11:09:28 17 about the companies and stocks themselves, as opposed
11:09:31 18 to the allegation that they're omitting their sales
11:09:35 19 which is something that they're omitting their sales,
11:09:35 20 which is talking about the individual defendants'
11:09:38 21 conduct. Traditionally -- I'm unaware of --

11:09:42 22 THE COURT: Well, I'll allow
11:09:43 23 cross-examination on that. Assuming he testifies on
11:09:47 24 direct, which you said he's going to do.

11:09:52 25 All right. The Court should not -- should

11:09:56 1 preclude evidence and argument about United States
11:09:59 2 decision not to call a particular witness. I'm
11:10:02 3 granting that.

11:10:03 4 The Court should preclude defendants from
11:10:06 5 cross-examining cooperating witness as to the specific
11:10:10 6 of potential sentencing guidelines under the guideline
11:10:14 7 system.

11:10:17 8 MR. ARMSTRONG: Your Honor, I apologize.
11:10:18 9 I believe you might have skipped 15, pretrial
11:10:21 10 discovery.

11:10:23 11 THE COURT: Oh, I did.

11:10:24 12 The jury should not hear evidence and
11:10:26 13 argument about pretrial discovery. I agree with that.
11:10:29 14 I'm granting that.

11:10:33 15 MR. FORD: May I weigh in on number 16?
11:10:43 16 So this is -- you just said you
11:10:45 17 would grant -- you were inclined to grant or did grant
11:10:48 18 the motion to preclude evidence about the United
11:10:51 19 States' decision not to call a particular witness.

11:10:54 20 This will become more apparent during the
11:10:58 21 course of the trial, but the fact that there's going
11:11:00 22 to be individuals whose names are all over their
11:11:04 23 exhibits and then all over these companies and stocks
11:11:08 24 that are not being called is going to be relevant to
11:11:11 25 our defense to the extent they're permitted to make

11:11:15 1 causation, artificially inflated pump and dump-type
11:11:19 2 arguments.

11:11:19 3 So I don't know if that's going to
11:11:21 4 admitted, as they appear to have abandoned it.

11:11:24 5 But if this becomes a trial where there is
11:11:26 6 an allegation, for example, that the price of a stock
11:11:30 7 was artificially inflated by these individuals, we
11:11:35 8 would need to reserve the right to point out the fact
11:11:38 9 that we have identified actual insiders who were
11:11:43 10 responsible for the stock going up and down and that
11:11:45 11 the government never even bothered to speak to them,
11:11:46 12 let alone to call them as witnesses.

11:11:48 13 So in that context, it would come up. We
11:11:51 14 plan on arguing that they should -- since they've
11:11:53 15 abandoned the causation piece of this, that they
11:11:56 16 should not be allowed to talk about artificially
11:11:59 17 inflating or pumping and dumping stocks. But if that
11:12:02 18 gets in, we would like to reserve the right to make
11:12:04 19 those arguments.

11:12:06 20 MR. ARMSTRONG: I mean, Your Honor, that's
11:12:07 21 a lot to unpack.

11:12:09 22 First off, the notion that they're going
11:12:12 23 to try to blame insiders for price movement of stocks?
11:12:16 24 With what foundation? And that goes squarely against
11:12:18 25 Your Honor's ruling that they cannot blame other

11:12:20 1 people who are not charged in this case. So that just
11:12:25 2 off the bat just smacks of number one, the ruling that
11:12:27 3 we just heard.

11:12:28 4 And, number two, how are they ever going
11:12:30 5 to get that kind of evidence in at trial.

11:12:33 6 THE COURT: Well, when we were talking
11:12:34 7 about blame earlier, we were talking about the
11:12:38 8 so-called victims.

11:12:41 9 MR. FORD: Yes.

11:12:41 10 THE COURT: I presume you're not talking
11:12:42 11 about victims. You're talking about somebody made,
11:12:47 12 you know, a big play with insider trading or of stock
11:12:51 13 buyback or a merger offer.

11:12:56 14 MR. FORD: I can do it all through 8-Ks
11:12:59 15 and other SEC filings. We do a lot of this work.
11:13:04 16 Here's the playbook. If you're inclined.

11:13:08 17 You have an outside investment firm that
11:13:12 18 purchases what's called warrants. That allows you to
11:13:16 19 buy stock at a very low cost. Next to nothing.
11:13:20 20 Basically free shares.

11:13:21 21 The company then issues several shares to
11:13:24 22 their insiders. They then pay an individual who puts
11:13:28 23 out false information about the company. Other
11:13:31 24 individuals will engage in match or wash trading,
11:13:37 25 which will set off a volume in price spike.

11:13:41 1 The individuals who obtain the warrants
11:13:42 2 and insiders will then dump their stock off into the
11:13:44 3 price and it will immediately tank.

11:13:46 4 I can assure Your Honor that you can pick
11:13:49 5 almost any stock on their list, that some of them at
11:13:51 6 trial I plan to go over who in fact was responsible
11:13:54 7 for these pump and dumps.

11:13:55 8 And it is relevant to what happened here
11:13:57 9 with these individuals, because if they're simply
11:14:00 10 buying into increases in volume and price, it does not
11:14:04 11 suggest that they had any intent to do anything
11:14:07 12 wrong --

11:14:07 13 THE COURT: Well, I see that differently.
11:14:10 14 I mean, you're not going to go into that in a vacuum.
11:14:14 15 You're going to have to be questioning a witness about
11:14:16 16 that.

11:14:17 17 MR. FORD: Yeah. And we intend to --

11:14:19 18 THE COURT: And it may be their expert.
11:14:20 19 It may be your expert or whatever. And I think it's
11:14:26 20 fair game to say to their expert, well, did you look
11:14:30 21 at X? Did you look at Y? Did you -- that's fair
11:14:33 22 game. That's different than saying they didn't call
11:14:36 23 this witness.

11:14:38 24 MR. ARMSTRONG: Well, Your Honor, the gist
11:14:39 25 of that is what Your Honor just precluded in

11:14:41 1 Number 13. The Court should preclude all evidence and
11:14:50 2 argument about the conduct/misconduct of other
11:14:54 3 uncharged individuals. They're trying to --

11:14:55 4 THE COURT: Well, I think they can -- if
11:15:02 5 they're putting on evidence that they had nothing to
11:15:05 6 do with the stock going up or down, if that's an
11:15:11 7 issue, they can rebut that, can't they?

11:15:15 8 MR. ARMSTRONG: I think we have a
11:15:21 9 fundamental disagreement about, you know, the
11:15:27 10 causation issue, right. We are not going to allege
11:15:32 11 ever that the defendants were the sole cause, right.
11:15:37 12 We're going to prove, and as we've alleged, that they
11:15:41 13 knew that their conduct had an effect. And their
11:15:44 14 co-conspirators who are going to testify at trial saw
11:15:48 15 it have the effect over and over again.

11:15:51 16 That goes squarely to the charges in this
11:15:54 17 case and how we're going to prove up the elements.
11:15:56 18 They're talking something entirely different.

11:15:58 19 THE COURT: Okay. Well, they're talking
11:15:59 20 about what made the price of the stock go up.

11:16:02 21 MR. FORD: Here's the question, Your
11:16:03 22 Honor. If ONTX, Count 2, the first count against my
11:16:09 23 client, I'm going to stand before you, and I can
11:16:12 24 assure I will persuade everybody in this room on this
11:16:15 25 issue --

11:16:16 1 THE COURT: I'm willing to bet that's not
11:16:18 2 true. Not everybody in this room.

11:16:22 3 MR. FORD: I'll put money on it.

11:16:25 4 They attempted to do a reverse split.

11:16:27 5 When they didn't work, they issued free shares to
11:16:30 6 their insiders, to their CEO. They gave shares to a
11:16:33 7 company we have identified in the form of warrants.

11:16:36 8 None of these individuals knew anything about this.

11:16:39 9 There was a press release that went out.
11:16:40 10 The stock started to go up. The guys who traded it,

11:16:44 11 and it's just a handful -- you know, it's a couple few
11:16:46 12 of them, it's not all of them, but the guys who saw
11:16:48 13 that happen said here's a chance to make some money
11:16:50 14 and they bought it.

11:16:51 15 This isn't an issue with some of these
11:16:56 16 stocks of generalized sort of there is multiple
11:16:59 17 factors. In some of these cases I've been able to pin
11:17:02 18 down exact parties or individuals who are responsible.

11:17:05 19 And I would reserve the right to present
11:17:07 20 that to the jury to show that what these individuals
11:17:11 21 were doing were merely identifying movement in the
11:17:15 22 markets and using it as an opportunity to make money.

11:17:19 23 MR. ARMSTRONG: Your Honor, if I could be
11:17:20 24 heard on this point. I think this is the super
11:17:21 25 relevant.

11:17:49 1 If we could go to Government Exhibit 2B,
11:17:52 2 at page 31, please. And, Ms. Kim, if you could please
11:17:56 3 blow up lines 181 through the bottom, please.

11:18:04 4 So, Your Honor, what this is, this is one
11:18:06 5 of our charts that we're planning to introduce through
11:18:09 6 Ms. Garibotti. And the reason why we're offering this
11:18:12 7 statement to be false has everything to do with what
11:18:17 8 Mr. Constantinescu is saying and doing.

11:18:20 9 It doesn't have to do with insiders. It
11:18:22 10 doesn't have to do with other people who might have
11:18:24 11 warrants. It doesn't have to do with 8-K forms. It
11:18:27 12 has to do with what he's saying at the time and what
11:18:30 13 he's actually doing.

11:18:31 14 And what he's saying on line 111 is: ONTX
11:18:35 15 holding full. Not selling under 2.

11:18:40 16 So what does he start doing? Eight
11:18:42 17 minutes later he starts dumping his shares, eight
11:18:45 18 minutes later, at 1:28, 1:30, 1:24, 1:20.

11:18:50 19 Your Honor, that's what this case is
11:18:51 20 about; what the defendant said and what he did.

11:18:54 21 THE COURT: No. And what I understand
11:18:57 22 what Mr. Ford just said is that to the extent that the
11:19:11 23 government is going to claim that the defendants'
11:19:12 24 activities actually affected the price of the stock,
11:19:17 25 he wants to be able to cross-examine witnesses that

11:19:22 1 there were other factors that did that, not the
11:19:24 2 defendants. Or at least not the defendants in total.

11:19:31 3 MR. FORD: Yeah. And I will just point
11:19:32 4 out that -- we're going to get into it later, but this
11:19:34 5 chart that they paid somebody \$750,000 to make, it's
11:19:39 6 inaccurate. We'll show you later on in these hearings
11:19:42 7 what -- we'll explain to you it's inaccurate. But
11:19:46 8 we'll get to that, our actual defense of his conduct
11:19:49 9 at the trial.

11:19:50 10 But I just want to reserve the right at
11:19:52 11 this point, if we're going -- if they're going to be
11:19:55 12 allowed to stand up and say that my client's actions,
11:19:58 13 through his Twitter, somehow affected a stock price, I
11:20:01 14 would like to be able to raise it.

11:20:03 15 We could also lay --

11:20:04 16 THE COURT: I see that as a different
11:20:06 17 point than the point you're making, Mr. Armstrong. I
11:20:08 18 mean, you're saying that, you know, while he was
11:20:14 19 telling all his followers to buy, he was selling.

11:20:17 20 MR. ARMSTRONG: Exactly.

11:20:20 21 THE COURT: And I, you know, agree that
11:20:23 22 that's a different animal.

11:20:28 23 And I think Mr. Ford made that
11:20:32 24 distinction, because what he prefaced his remarks on
11:20:36 25 was, if the government claims or puts on evidence that

11:20:41 1 Mr. Constantinescu or any of the other defendants,
11:20:44 2 that their actions actually sent the price of the
11:20:48 3 stock up, then they have a right to say, wait a
11:20:52 4 minute, we weren't -- I mean, that's the plumbing
11:20:54 5 part, if you will. I mean, arguably.

11:21:00 6 Then they get the right to say, well,
11:21:05 7 look, we didn't affect the price of the stock. You
11:21:07 8 know, the fact that 3M came in and bought the company,
11:21:11 9 you know, in the middle of all this made the stock go
11:21:13 10 up.

11:21:17 11 And I think that's legitimate, as opposed
11:21:22 12 to having some third party or third unrelated person
11:21:28 13 perhaps that was on -- also on Twitter, saying buy
11:21:34 14 this company, that we don't know anything about,
11:21:42 15 that's really what I -- when I granted your motion,
11:21:44 16 that's what I was granting it on.

11:21:48 17 But I think to the extent that that's an
11:21:51 18 issue -- and by "that" I mean, the price of the stock
11:21:53 19 going up, to the extent the government blames the
11:21:57 20 defendants for that, the defendants have a right to
11:22:00 21 say, hey, it wasn't us. It was some other company
11:22:03 22 that did this or some other insider or some -- the
11:22:06 23 president of the company announced they just invented
11:22:09 24 a new widget.

11:22:13 25 MR. ARMSTRONG: But, Your Honor, just --

11:22:13 1 even hearing that just now, the gist of that is not
11:22:16 2 just this other actor affected the price. The gist of
11:22:20 3 that is somebody else, some boogieman, some corporate
11:22:25 4 insider out there is really the culpable person here
11:22:28 5 and not our defendants.

11:22:31 6 THE COURT: Well, they might -- you're
11:22:34 7 drawing the distinction that I don't think I'm
11:22:36 8 drawing.

11:22:36 9 You're saying -- by "culpable," you're
11:22:40 10 saying the person that made the stock go up is
11:22:44 11 culpable.

11:22:45 12 I don't think that's the case here. I
11:22:48 13 don't think in your case that's the case here. I
11:22:51 14 think what you're saying is whether or not they made
11:22:55 15 the price of the stock go up, they lied to all these
11:22:58 16 people that they were encouraging to trade.

11:22:58 17 MR. ARMSTRONG: Exactly, Judge. I
11:22:58 18 think --

11:23:06 19 THE COURT: It has nothing to do with the
11:23:07 20 price of the stock going up. Whether it went up or
11:23:10 21 went down, they said we're doing X when really they
11:23:15 22 were doing Y.

11:23:16 23 MR. FORD: Your Honor, if I may respond
11:23:17 24 quickly. So two things.

11:23:19 25 THE COURT: I finally got them on board

11:23:21 1 and you're going to talk them out of it.

11:23:23 2 MR. FORD: So no. Well, what I will say
11:23:24 3 is, it brings back the Ciminelli point, which is, if
11:23:27 4 they're buying and selling at the bona fide market
11:23:31 5 price, their theory falls apart. So we're wasting an
11:23:35 6 inordinate amount of time. Like I said, we'll do it
11:23:37 7 as an SEC thing.

11:23:38 8 But the second issue that I have with this
11:23:42 9 is we're sort of putting the cart before the horse.
11:23:45 10 And it's just the way the things fell into place,
11:23:48 11 which is we had moved to in limine to prevent them
11:23:52 12 from talking about causation, that our clients caused
11:23:55 13 the stock, we moved to prohibit them from
11:23:58 14 using causation language. So not using
11:23:58 15 inflammatory --

11:23:58 16 THE COURT: Well, we're going -- I'm
11:23:59 17 taking yours up next. It's just that way in my
11:24:02 18 notebook.

11:24:03 19 MR. FORD: Yeah. But that's -- you know,
11:24:03 20 if we can agree on that, it will streamline things.
11:24:05 21 And if I'm hearing them correctly, we'll knock out
11:24:09 22 causation and nobody talks about the defendants --

11:24:15 23 THE COURT: Well, I don't think -- you
11:24:15 24 guys really don't care whether the stock went up or
11:24:17 25 not or why, do you?

11:24:20 1 MR. LIOLOS: So two trains, two tracks
11:24:21 2 here, Judge.

11:24:21 3 THE COURT: I mean, obviously you care
11:24:23 4 because your argument is going to be they did it to
11:24:26 5 make money. And I think -- I don't know if the
11:24:28 6 defendants are going to testify or not, but I'm sure
11:24:30 7 if they testified, they would say, yeah, we did it to
11:24:34 8 make money. That's why we were doing this stuff.

11:24:36 9 MR. FORD: That's the only reason people
11:24:39 10 buy and sell stock that I'm aware of.

11:24:42 11 MR. LIOLOS: The helpful way to conceive
11:24:44 12 of the point that we're talking about right now, and I
11:24:45 13 think Your Honor is tracking this, is it's the success
11:24:47 14 of the scheme points that we were talking about,
11:24:49 15 right. The focus here is on the defendants'
11:24:51 16 fraudulent intent, the defendants' actions.

11:24:54 17 The success of the scheme is legally
11:24:55 18 irrelevant because the legal liability attaches at the
11:24:59 19 time of the scheme with the fraudulent intent.

11:25:01 20 Now, the points about, you know, who and
11:25:05 21 what moved the market, that's after that point.

11:25:08 22 And as to the pump and dump points that
11:25:11 23 they're discussing, that also tracks with the
11:25:14 24 fraudulent intent, because you'll see the evidence
11:25:18 25 again and again. In their own words they believed

11:25:19 1 what they were doing could influence the market. They
11:25:22 2 sought to do that. They coordinated to do that.
11:25:24 3 You'll see it in documents --

11:25:25 4 THE COURT: Okay. And you guys are going
11:25:26 5 to put in evidence of that. And all I'm saying is if
11:25:29 6 you guys put in evidence of them affecting the price
11:25:32 7 of stock, the defendants have a right to put in
11:25:35 8 contrary evidence.

11:25:36 9 MR. LIOLOS: I think the distinction, Your
11:25:40 10 Honor, that maybe it's helpful in terms of a
11:25:40 11 cross-examination is one point, but a parade of
11:25:42 12 witnesses talking about irrelevant causation is a
11:25:45 13 helpful distinction, because one is closer to the
11:25:49 14 defendants' activity. I mean, there has to be some
11:25:51 15 sort of foundation.

11:25:52 16 THE COURT: Let me go back to my example
11:25:54 17 that I don't think is farfetched, because I think it's
11:25:56 18 actually one of the allegations in this case, is the
11:26:00 19 price of oil.

11:26:04 20 Okay. You know, the United States
11:26:08 21 announces a Russian oil blockade. Okay. One of the
11:26:15 22 defendants tweets that out, saying, man, it's going to
11:26:21 23 be a great play buying an oil company stock.

11:26:25 24 I mean, first of all, that's not rocket
11:26:26 25 science. If the price is -- I mean, if there's an oil

11:26:27 1 blockade, the price is going to go up. Now, how long
11:26:30 2 it stays up may depend on whether -- how long the
11:26:33 3 blockade or even if it works or not. But, okay.

11:26:36 4 So I anticipate you guys are going to say,
11:26:45 5 look at this tweet, he urged everybody to buy this oil
11:26:48 6 company because of the price of stock. And it made
11:26:52 7 the stock go up.

11:26:54 8 And if you do that, Mr. Ford wants to come
11:26:57 9 in and say, hey, ladies and gentlemen of the jury, it
11:27:00 10 wasn't my guy's tweet that made the stock go up. What
11:27:05 11 made the stock go up was the Russian oil blockade.

11:27:08 12 MR. LIOLOS: I think, Your Honor, the
11:27:09 13 critical distinction there is that they're the tether
11:27:11 14 to the defendants' conduct, right. They were aware of
11:27:15 15 the Russian oil blockade. They were tweeting about
11:27:18 16 it.

11:27:18 17 THE COURT: But, see, that's --

11:27:19 18 MR. LIOLOS: That's different --

11:27:20 19 THE COURT: I kind of don't understand why
11:27:22 20 we're fighting about this. Because according to the
11:27:26 21 government's theory, unless you explain to me
11:27:29 22 differently, I mean, obviously your theory works
11:27:34 23 better if the price of the stock goes up. Because
11:27:36 24 that's the pump part of a pump and dump, so to speak.

11:27:40 25 But it doesn't really matter, does it?

11:27:43 1 What matters is, from y'all's standpoint and correct
11:27:48 2 me if I'm wrong, because I may be operating under the
11:27:51 3 wrong impression. It's not what they did, in essence,
11:27:58 4 that say buy this stock, we think it's a good play.
11:28:03 5 But after they did it, they then did the opposite and
11:28:08 6 didn't tell anybody.

11:28:09 7 MR. FORD: Well, but -- Your Honor, just
11:28:11 8 to be clear, I wouldn't expect you to know this, but
11:28:13 9 we're going to learn it over the next day or however
11:28:16 10 long it takes to get through the government's
11:28:17 11 exhibits, but that is not what these individuals were
11:28:19 12 doing. My client never went on and said, you know,
11:28:22 13 buy this stock, do this thing.

11:28:24 14 What he said was truthful; that he had
11:28:28 15 bought the stock and that he thought it was a good
11:28:30 16 stock that other people had potential to make money
11:28:33 17 on --

11:28:34 18 THE COURT: Okay. And I understand that.
11:28:36 19 I mean, I was just being -- well, I won't say
11:28:38 20 flippant, but I was just trying to short-circuit it,
11:28:41 21 is does it really matter?

11:28:45 22 MR. FORD: They're trying to have the cake
11:28:46 23 and eat it too.

11:28:47 24 THE COURT: Well, I know. That's what
11:28:49 25 bothers me. Is if you guys are going to talk about

11:28:51 1 what makes the stock price go up with a particular
11:28:55 2 stock, I'm going to allow the defendant to come back
11:28:58 3 in and say, it wasn't these tweets, it was the fact
11:29:02 4 that the Japanese came in and bought U.S. steel, I
11:29:08 5 mean, and that made the price of the stock of U.S.
11:29:11 6 steel go up.

11:29:12 7 Or the president said he doesn't like that
11:29:14 8 merger and the stock would go down.

11:29:20 9 Okay.

11:29:24 10 MR. LIOLOS: I just -- I think there's a
11:29:25 11 403 potential to go too far down that road without any
11:29:29 12 sort of line drawing to tether it to the defendants'
11:29:32 13 fraudulent intent, which is the legal focus, right.
11:29:35 14 So if they're aware --

11:29:38 15 THE COURT: It's not going to their --
11:29:39 16 well, it may go to their intent. It may undermine
11:29:42 17 your argument that they were trying to get the stock
11:29:44 18 up. But I think -- I guess in a way I can't see how
11:29:50 19 this hurts you.

11:29:51 20 MR. LIOLOS: Well, it just --

11:29:53 21 THE COURT: Because it doesn't really go
11:29:55 22 to any part of your case.

11:29:56 23 MR. LIOLOS: Agreed, which shows that --

11:29:58 24 THE COURT: But it goes to the part of
11:30:00 25 their intent and what they're doing. It goes to their

11:30:03 1 defense that they didn't have the intent to do all
11:30:05 2 this.

11:30:06 3 MR. LIOLOS: If they knew about it, right.
11:30:07 4 If there's some foundation that they knew about it --

11:30:08 5 THE COURT: Well, I'm assuming they said
11:30:10 6 it in one of their tweets, they obviously knew about
11:30:13 7 it.

11:30:13 8 MR. LIOLOS: Agreed. I think that's a
11:30:14 9 helpful line to draw, right. So if they said
11:30:15 10 something about it, that comes in.

11:30:17 11 THE COURT: You just don't know what they
11:30:18 12 knew or didn't know.

11:30:21 13 MR. FORD: All five of the charges against
11:30:22 14 Mr. Constantinescu are stocks that had huge major news
11:30:26 15 announcements that he then posted about is the reasons
11:30:29 16 why he thought this might be a nice investment for
11:30:31 17 people to make surrounded by almost obsessive warnings
11:30:37 18 saying if you have to ask me if I should buy it now,
11:30:40 19 it's too late. If you're chasing, don't buy it. I
11:30:44 20 don't post my buys and sells, right. If you're losing
11:30:45 21 money on the stocks I'm recommending --

11:30:47 22 THE COURT: If we go far afield, object to
11:30:50 23 it. But I'm going to allow them -- if the government
11:30:55 24 talks about what made the stock go up, I'm going to
11:30:58 25 allow the defendants to say, ah, but there were other

11:31:01 1 factors. I mean, to the extent that's relevant to
11:31:05 2 what the jury is going to decide, both sides ought to
11:31:08 3 be able to put on evidence.

11:31:11 4 MR. FORD: Your Honor, just to be -- our
11:31:14 5 position fundamentally is that this causation argument
11:31:16 6 has been abandoned based on their witness and their
11:31:19 7 exhibit list. They failed to notice properly under
11:31:23 8 the new expert rules, the only individual who could
11:31:27 9 talk about this, which is Peter Melley, M-E-L-L-E-Y.
11:31:31 10 They never noticed that they were going to have a
11:31:33 11 causation expert.

11:31:36 12 The notion of conflating correlation and
11:31:38 13 causation, it's come up before the Fifth Circuit
11:31:40 14 before. It becomes a pony show in here if we allow
11:31:46 15 them to come in and say, hey, they tweeted on the same
11:31:49 16 day the volume went up. They bought the same day the
11:31:51 17 volume went up.

11:31:52 18 Well, of course they did. They're day
11:31:54 19 traders. That's why they bought. They saw the volume
11:31:55 20 go up and they bought it. And then they wanted to
11:31:56 21 impress everybody, so they tweeted about it. It's a
11:31:59 22 correlation versus causation issue and they're trying
11:32:01 23 to back-door it in.

11:32:02 24 This is why it's our -- you know, we have
11:32:05 25 two fundamental issues during this hearing that we're

11:32:08 1 doing. And one of them is removing causation pump and
11:32:12 2 dump artificially inflated language. And the other
11:32:12 3 one has to do with Ms. Garibotti, which we'll discuss
11:32:17 4 later.

11:32:17 5 But this is -- you know, to us, they
11:32:19 6 abandoned it. They waived it. They've repeatedly
11:32:20 7 said in filings over the past, you know, 15, 16 months
11:32:24 8 they're not going to do this. We think they should be
11:32:26 9 barred --

11:32:26 10 THE COURT: Well, if they don't do it,
11:32:28 11 then you're not going to be able to cross-examine the
11:32:29 12 person on it. Because if they don't open the door,
11:32:32 13 I'm not letting you walk through it.

11:32:35 14 MR. FORD: That's a fair compromise.
11:32:36 15 Thank you.

11:32:37 16 MR. LIOLOS: Thank you, Judge.
11:32:39 17 THE COURT: All right. I'm granting as to
11:32:44 18 cross-examination of any cooperating witnesses as to
11:32:47 19 specifics under the guidelines. But that's not to say
11:32:51 20 that I'm not going to allow defendants to
11:32:55 21 cross-examine them that you're facing a prison
11:32:56 22 sentence, you do all this. I'm just -- I'm not
11:32:58 23 letting you whip out the sentencing guideline manual
11:33:01 24 and beat them over the head with it.

11:33:03 25 All right. I need to take a short break.

11:43:57 1 (Court in recess.)
11:56:14 2 THE COURT: Okay. When last we left, I
11:56:20 3 had ruled on the sentencing guidelines. And now we
11:56:25 4 come to a witness's irrelevant drug use.

11:56:29 5 What do -- we have witnesses and drugs?

11:56:32 6 MR. ARMSTRONG: Generally, Your Honor, and
11:56:34 7 I think you've heard about how they plan to use it
11:56:37 8 today. And if they plan to attack a witness's
11:56:41 9 perception and ability to perceive based on taking
11:56:45 10 drugs like at that time, that's fair game. We have no
11:56:48 11 issue with that.

11:56:49 12 What they're trying to do instead is
11:56:50 13 they're trying to just generally impugn someone's
11:56:54 14 character at large based upon prior drug use or prior
11:56:58 15 elicit activity, which is improper. It does not go to
11:57:01 16 credibility.

11:57:03 17 THE COURT: All right. I'm granting that.

11:57:07 18 If during the trial someone can show me
11:57:09 19 some relevance. But I think Mr. Armstrong kind of hit
11:57:18 20 it on the head. General drug use in the past, or even
11:57:22 21 present, has no relevance. But if it affects his
11:57:27 22 character or what he did here, then I'll listen to it.

11:57:40 23 Do we have any alibi defenses? Somebody
11:57:44 24 stole my computer? I wasn't on it?

11:57:49 25 I mean, one thing we probably know is all

11:57:52 1 the defendants were somewhere near their computer at
11:57:56 2 the times in question.

11:57:58 3 MR. ARMSTRONG: You should ask Mr. Ford,
11:58:01 4 is he going to argue that someone else was making
11:58:03 5 these tweets.

11:58:04 6 THE COURT: Okay. I'm granting that. I'm
11:58:05 7 precluding alibi defenses that haven't been discussed.

11:58:12 8 And then the next one is kind of vague.

11:58:15 9 It's --

11:58:15 10 MR. FORD: Your Honor, if I may.
11:58:17 11 Multiple of the government's witnesses are going to
11:58:19 12 testify that another individual, during my client's
11:58:24 13 extended absence in Mexico, had access to his Twitter
11:58:29 14 account and was tweeting. It's in the Government 302.
11:58:31 15 I don't understand this to be an alibi defense, but it
11:58:35 16 is something that may come up at trial.

11:58:38 17 THE COURT: All right. Well, if it comes
11:58:40 18 up, we'll deal with it then. But unless you're going
11:58:43 19 to say that some of the tweets in question that
11:58:49 20 pertain to the indictment are not relevant or not your
11:58:56 21 client's tweets, then I think the government is
11:58:57 22 entitled to know that.

11:58:57 23 MR. FORD: Okay.

11:59:11 24 THE COURT: All right. The next one I'm
11:59:12 25 going to pass over, because it's so vague I don't even

11:59:14 1 know what it means.

11:59:18 2 But precluding all evidence or argument
11:59:20 3 about vagueness or ignorance of the law, I'm granting
11:59:23 4 that. I'm -- I'm looking at -- Mr. Armstrong, I'm
11:59:38 5 looking at 21(b), which is the Court should preclude
11:59:44 6 evidence and argument suggesting defendants are not
11:59:46 7 securities professionals with corresponding duties.

11:59:54 8 Now, there are different duties that go
11:59:57 9 along with being certain kinds of brokers or -- so
12:00:06 10 what are we actually intending here?

12:00:09 11 MR. ARMSTRONG: I think the last sentence
12:00:17 12 on page 65 covers the gist of our argument.

12:00:22 13 The Court should preclude defendants from
12:00:23 14 arguing that they're not covered by other securities
12:00:26 15 laws or regulations, they're not regulated
12:00:29 16 sophisticated securities professionals, or some other
12:00:32 17 variant of these arguments.

12:00:47 18 THE COURT: The reason I'm hesitating, I
12:00:48 19 mean, I think -- I'm not going to let them testify as
12:00:50 20 to the law, but I think it's going to be clear that
12:00:53 21 the defendants aren't securities professionals, you
12:01:00 22 know, and so they don't owe, say, a fiduciary duty to
12:01:07 23 anyone. And I'll probably instruct the jury on that.

12:01:15 24 But having said that, I mean, I think you
12:01:19 25 guys, the government's not claiming they were

12:01:21 1 fiduciaries. You're just claiming they lied to them.

12:01:24 2 MR. ARMSTRONG: Their duty was to speak
12:01:26 3 honestly.

12:01:32 4 MR. WILLIAMS: Your Honor, I think it may
12:01:37 5 also relate to the cross-examination of Peter Melley,
12:01:40 6 because he's from FINRA, which regulates licensed
12:01:43 7 professionals, which they're not. And so there may be
12:01:47 8 a question or two that we don't want to violate a
12:01:50 9 motion in limine by confirming with him that his
12:01:52 10 employer does not regulate these defendants.

12:01:59 11 THE COURT: I'll allow that.

12:02:00 12 MR. WILLIAMS: Thank you.

12:02:00 13 MR. ARMSTRONG: Your Honor, that's a very
12:02:01 14 interesting line of cross, considering that they're
12:02:03 15 trying to introduce the FINRA reports to show lack of
12:02:03 16 intent, lack of intent to defraud.

12:02:07 17 THE COURT: That's all right. I'm sure
12:02:07 18 you'll remind me of that when we get there.

12:02:21 19 All right. This one I think is more
12:02:22 20 contentious. The Court should preclude evidence and
12:02:26 21 arguments suggesting defendants had no independent
12:02:29 22 duty to disclose their stock transactions.

12:02:35 23 I mean, as a sentence, that sentence is
12:02:40 24 true.

12:02:44 25 MR. ARMSTRONG: Your Honor, I think this

12:02:45 1 one is subsumed by part B on page 55, which we just
12:02:50 2 talked about.

12:02:50 3 THE COURT: Okay.

12:02:51 4 MR. ARMSTRONG: The duty comes from
12:02:51 5 speaking and not from anywhere else.

12:02:54 6 THE COURT: Yes.

12:02:54 7 MR. LIOLOS: And, Your Honor, just for
12:02:55 8 context for you, these four, A, B, C, and D, are just
12:02:59 9 taken from the motions to dismiss in terms of the
12:03:03 10 legal argument that Your Honor has already addressed.

12:03:10 11 THE COURT: All right. And the last one
12:03:10 12 is, the First Amendment is not a defense in this case
12:03:13 13 and should not be mentioned. I'll grant that. If you
12:03:18 14 want to argue the First Amendment, you can approach
12:03:20 15 the bench.

16 Okay.

17 MR. DAVIS: Can I interrupt, Judge? The
18 First Amendment poster is --

19 THE COURT: We'll put a big asterisk on it
20 that says: Stocks not included.

21 Let's go to Document 539, which is the
22 defendant's joint motion. And then I'll come back and
23 we'll talk about --

24 Now, their motion starts off with various
25 concessions. And the first one is the point Mr. Ford

12:04:11 1 just brought up when we were talking about whether the
12:04:16 2 defendants make the market move.

12:04:41 3 I mean, I don't feel like I can grant the
12:04:45 4 motion in limine. I'll take it question by question.
12:04:48 5 But as I've said, if the government opens that door,
12:04:51 6 I'm going to let the defendants talk about it too.

12:04:57 7 MR. FORD: In addition, Your Honor, I
12:04:59 8 mean, it will help for trial prep and just general,
12:05:05 9 you know, presentation for everybody if we can narrow
12:05:08 10 this issue.

12:05:09 11 There's two other points we're raising,
12:05:12 12 which is artificially inflated, that notion or that
12:05:16 13 sort of phraseology by definition means causation,
12:05:20 14 right. They artificially inflated, right.

12:05:26 15 It shouldn't have gone up but for their
12:05:29 16 conduct. And the phrase "pump and dump," it is the
12:05:33 17 same notion, right. Of course, the understanding of a
12:05:37 18 pump and dump is that you engage in conduct that
12:05:41 19 causes a stock to go up artificially, and then you
12:05:43 20 sell it and the selling causes it to go down. So it's
12:05:46 21 a causation principle.

12:05:48 22 So we're concerned about it for the same
12:05:51 23 reason they have an exhibit where an unknown Twitter
12:05:54 24 account called Joker Trades refers to this as a Ponzi
12:05:58 25 scheme. I don't know what that means. I mean, nobody

12:06:00 1 even took any money from any of other followers
12:06:02 2 period, let alone a Ponzi scheme.

12:06:04 3 But it's the injection of these words like
12:06:06 4 "Ponzi scheme" and "pump and dump" that we think are
12:06:10 5 hugely prejudicial. So if we're not --

12:06:11 6 THE COURT: Well, we're going to get to
12:06:11 7 the one that says "pump and dump," but, I mean, didn't
12:06:13 8 some of the defendants actually use the term "pump"
12:06:16 9 anyway?

12:06:18 10 MR. FORD: Absolutely. But the term
12:06:20 11 "pump" is sort of common slang for saying something
12:06:24 12 good about a stock. Whereas the phrase "pump and
12:06:28 13 dump" describes a specific type of securities fraud.

12:06:32 14 We believe it's a prejudicial phrase. It
12:06:35 15 should have no place in this trial, any more than
12:06:38 16 Ponzi scheme or artificially inflated.

12:06:42 17 It, again, has baked into it the notion of
12:06:45 18 causation and it allows them to back-door correlation
12:06:47 19 principles to turn into causation once they get up and
12:06:50 20 say they pumped and dumped this stock.

12:06:56 21 THE COURT: Okay. The next issue is --
12:07:05 22 concerns the profits the defendant made. Who wants to
12:07:10 23 be heard on that from the defendants' standpoint?

12:07:19 24 Mr. Armstrong, do you have a -- does the
12:07:21 25 government have a feeling --

12:07:22 1 Well, go ahead, Mr. Ford, if you want to
12:07:24 2 address it.

12:07:25 3 MR. FORD: The issue is whether or not we
12:07:28 4 can discuss profits, is that --

12:07:30 5 THE COURT: Yes.

12:07:31 6 MR. FORD: Absolutely. The fact that my
12:07:35 7 client made tens of -- millions and millions of
12:07:38 8 dollars trading stocks like Tesla and American
12:07:41 9 Airlines and Carnival Cruise Lines before he ever had
12:07:45 10 a Twitter following is relevant to his intent when he
12:07:49 11 made these statements as to whether or not he intended
12:07:53 12 to deceive people.

12:07:55 13 We plan to put it in. It's a major part
12:07:58 14 of our defense. And it goes to his --

12:08:00 15 THE COURT: Okay. But it's your -- this
12:08:01 16 is partly your motion to keep it out. I'm reading the
12:08:06 17 defendants' joint motion.

12:08:08 18 MR. FORD: To preclude what?

12:08:10 19 THE COURT: Mention the profits.

12:08:14 20 MR. FORD: We certainly -- we will mention
12:08:18 21 them. We will -- and, truthfully, Your Honor, we
12:08:20 22 can -- Your Honor, you can discuss this shortly. But
12:08:23 23 we will stipulate to it.

12:08:25 24 I mean, it's -- you know, we will not
12:08:27 25 agree that the profits derive from any wrongdoing.

12:08:31 1 But, I mean, the tax records say what the tax records
12:08:34 2 say.

12:08:35 3 THE COURT: Mr. Rosen?

12:08:36 4 MR. ROSEN: Yeah. The issue of profits
12:08:42 5 comes down to this: And they're trying to -- the
12:08:46 6 government has set up these charts that we'll talk
12:08:48 7 about later, the Garibotti charts that include
12:08:53 8 references to total amounts made during certain time
12:08:56 9 periods in certain stocks. They call that an episode.

12:08:59 10 The problem is they have done no work and
12:09:02 11 say they don't have to tie those profits to any
12:09:04 12 causation, as to whether they're derived from
12:09:08 13 securities fraud or not. This is, of course, a
12:09:10 14 securities fraud trial. So, therefore, total amounts
12:09:13 15 are completely irrelevant.

12:09:15 16 If they want to go back and try to find
12:09:18 17 someone to tie in those -- the amounts that are a
12:09:24 18 subset of that to any fraud gains by showing that it
12:09:27 19 was due to some artifical increase in price and people
12:09:29 20 bought into that, that's fine. But they haven't done
12:09:31 21 that here. They refuse to do it. They can't do it.
12:09:34 22 And yet they have substituted in this, like, amorphous
12:09:40 23 total amounts earned without any time to the actual
12:09:43 24 issues here at trial.

12:09:44 25 And that's where we come out with the

12:09:45 1 profits motion in limine as to what we want to exclude
12:09:49 2 from evidence. And that's the basis for our motion.

12:09:58 3 THE COURT: Mr. Armstrong, you want to
12:09:59 4 weigh in?

12:10:00 5 MR. ARMSTRONG: If you want us to, Your
12:10:01 6 Honor, I'd be happy to if you want us to --

12:10:04 7 MR. REYES: Mr. Reyes again.

12:10:07 8 Just wanted to add to what Mr. Rosen said
12:10:10 9 and not duplicate it, but these numbers, these profit
12:10:13 10 numbers, are inextricably intertwined with this idea
12:10:18 11 of causation.

12:10:19 12 From our point of view, Your Honor, the
12:10:21 13 minute they stand up and say -- first it was 114
12:10:24 14 million. Now it's 30 million. Those numbers have to
12:10:27 15 do with causation, Your Honor. And if we're talking
12:10:31 16 about this issue of causation, they have not shown it.
12:10:35 17 They have not done the work, the causal analysis as
12:10:38 18 Mr. Rosen said.

12:10:39 19 So it could be that, as you mentioned
12:10:41 20 earlier today, they open the door right away when they
12:10:44 21 say it, but I think what we're saying, Your Honor, is
12:10:46 22 the door shouldn't be opened because this isn't a
12:10:49 23 case, even by their own concession, about causation.
12:10:52 24 It's about intent.

12:10:53 25 And that's -- I have nothing further, Your

12:10:56 1 Honor, but I wanted to add that. This issue is going
12:10:59 2 to come up right away, the minute they make an opening
12:11:01 3 statement.

12:11:03 4 MS. CORDOVA: Your Honor, if I may,
12:11:06 5 briefly. There are instances in which my client,
12:11:14 6 other defendants, bought a stock, sold a stock, before
12:11:15 7 any false statement was ever made that.

12:11:17 8 That profit in that stock is included in
12:11:23 9 the profit calculation that the government has
12:11:24 10 alleged. And we think that's inappropriate for the
12:11:26 11 jury to hear.

12:11:31 12 MR. ARMSTRONG: Thank you, Judge. So a
12:11:32 13 few things to respond to.

12:11:33 14 I think that the crux of this objection
12:11:36 15 relates to the charts of Ms. Garibotti. And so here's
12:11:39 16 how the charts were put together.

12:11:41 17 Ms. Garibotti has a defined window. And
12:11:43 18 it's earlier to do with an example, but I'm sure we'll
12:11:43 19 get into a lot of them down the road.

12:11:45 20 She'll have a window of time. During this
12:11:50 21 window of time, the defendants generally bought a
12:11:52 22 stock and then exited their positions. So those are
12:11:55 23 two bookends.

12:11:59 24 But in that period of time, there are
12:12:01 25 enumerate false statements littered along the way.

12:12:03 1 Some are short episodes, a day; some are a couple
12:12:09 2 weeks.

12:12:09 3 But the reason why it's important to have
12:12:11 4 the picture before the false tweets come out is
12:12:17 5 because we're going to have testimony from
12:12:18 6 co-conspirators on this point. They're going to say
12:12:20 7 that a lot of times what would happen is we would
12:12:21 8 front-load the stocks before --

12:12:23 9 THE COURT: Front-loading, you mean buy
12:12:25 10 them up before any --

12:12:26 11 MR. ARMSTRONG: Exactly. Buy them before
12:12:28 12 the tweets even come out. And a lot of times -- we'll
12:12:30 13 have testimony on this exact point from two people --
12:12:33 14 they will testify that because they're buying and
12:12:34 15 selling it -- sorry -- because they're buying it and
12:12:37 16 sending it around to their other co-conspirators and
12:12:39 17 other people that are in the scheme, as Mr. Cooperman
12:12:42 18 said, they have it down to a science.

12:12:43 19 Because they would buy it and then spread
12:12:45 20 the news amongst themselves before the alert to so
12:12:48 21 people, they could sometimes scalp and make quick
12:12:48 22 profits just on the run-up in price on their own, kind
12:12:54 23 of spreading the front-loaded news.

12:12:55 24 So that's why the trading profits before
12:12:58 25 the false tweet are absolutely relevant and will be

12:13:01 1 backed up by a foundation from two witnesses who are
12:13:03 2 partners in crime and co-conspirators.

12:13:06 3 THE COURT: And why would that be illegal?

12:13:08 4 MR. ARMSTRONG: Why would what?

12:13:09 5 THE COURT: I mean, even under your
12:13:10 6 theory. Why would be that illegal?

12:13:12 7 MR. ARMSTRONG: We're not saying that that
12:13:14 8 necessarily is illegal. But it is part of the scheme.
12:13:17 9 It is part of the foundation for them buying the
12:13:20 10 shares and then waiting for the false statements to
12:13:23 11 come out.

12:13:28 12 THE COURT: I'm going to take up the
12:13:30 13 charts when we get to the charts. As a general rule,
12:13:36 14 I think I'm not granting the profits made, because
12:13:43 15 obviously it cuts both ways. And so if there's an
12:13:47 16 objection, you can object as we go along.

12:14:07 17 Yeah. The next big objection, joint
12:14:08 18 objection are the charts themselves. And I'm going to
12:14:09 19 take them up when we take up the exhibits.

12:14:11 20 So let me then move to
12:14:11 21 Mr. Constantinescu's motion in limine that has to do
12:14:23 22 with Dr. Maria Garibotti and Mr. Melley.

12:14:26 23 Mr. Ford, do you want to give any kind of
12:14:29 24 introduction to that?

12:14:30 25 MR. ARMSTRONG: I apologize, Your Honor,

12:14:31 1 what number?

12:14:32 2 THE COURT: It is Number 540.

12:14:37 3 MR. ARMSTRONG: Thank you.

12:14:37 4 MR. FORD: We have a binder for you. It's
12:14:39 5 analog. We believe this presentation will be much
12:14:44 6 more effective if we can plug in the computers and put
12:14:47 7 it up on the screen.

12:14:48 8 The reason is we're dealing with Excel
12:14:54 9 spreadsheets, is the evidence at issue. It's just
12:14:56 10 easier to manipulate and filter them manually.

12:14:59 11 But I'm going to give you this in case we
12:15:05 12 have a power outage.

12:15:07 13 THE COURT: Because you know I'm
12:15:08 14 old-school. I like paper.

12:15:17 15 MR. FORD: If we open up, right before Tab
12:15:19 16 A --

12:15:19 17 THE COURT: So defendants need control of
12:15:28 18 the computer.

12:15:32 19 All right. Go ahead, Mr. Ford.

12:15:33 20 MR. FORD: This is an excerpt from the
12:15:36 21 revised expert report dated January 19th. I don't
12:15:40 22 have the cover page on, I just gave you this single
12:15:43 23 page.

12:15:45 24 It explains why she was hired. And she
12:15:49 25 was hired, it says, to calculate the profit the

12:15:53 1 at-issue traders realized during the at-issue trading
12:15:56 2 episodes.

12:15:56 3 Now, my colleagues representing
12:16:00 4 Mr. Rybarczyk also filed a motion on this and the
12:16:06 5 government responded by saying that's what we hired
12:16:09 6 her for, to calculate profits.

12:16:11 7 For this, she charged \$705 an hour. And
12:16:15 8 as of December, she had charged the government
12:16:19 9 \$544,000. I imagine we're up close to three-quarters
12:16:25 10 of a million now.

12:16:26 11 If we flip to page -- to Tab A, this is a
12:16:34 12 very short excerpt -- excerpt that inaccurately and
12:16:38 13 misleading purports to represent my client's trading
12:16:42 14 and actions from 10 a.m. and 4 seconds on October 14,
12:16:49 15 2021, in DATS. And then if you flip to the next page,
12:16:53 16 it continues and it goes to 11:37 a.m. and 3 seconds.

12:17:04 17 And this is part of a stack of papers
12:17:05 18 that's probably 3 inches big where she purports to
12:17:09 19 summarize the actions of my client. This is what she
12:17:13 20 was paid the big bucks for.

12:17:14 21 And on the first -- if we now flip -- keep
12:17:21 22 in mind all this green we're looking at. It's longer
12:17:25 23 than five football fields. If we flip to Tab C.

12:17:33 24 Tab C, this is an example of the cover
12:17:35 25 page on one of these very lengthy reports. You'll see

12:17:39 1 it says: Episode 272, trading in ONTX between
12:17:44 2 July 16, 2020 and August 26, 2020.

12:17:48 3 I would be remiss to not tell you that my
12:17:50 4 client did hold his position for close to a month and
12:17:56 5 a half. So an eternity in day trader time.

12:18:01 6 And, again, for \$705 -- bless you --
12:18:06 7 again, you can see where I've highlighted
12:18:09 8 Mr. Constantinescu's name.

12:18:11 9 At the top she purports to summarize his
12:18:13 10 number of Twitter posts about ONTX and the number of
12:18:17 11 times he mentioned it in Discord and then how much
12:18:20 12 shares he bought and how many shares he sold over the
12:18:23 13 course of this roughly month and a half.

12:18:24 14 And for the low price of \$705, and maybe
12:18:28 15 three-quarters of a million so far, she calculated
12:18:32 16 that he made 2,000 -- \$296,341.

12:18:39 17 Are you able to follow this on the top
12:18:40 18 where we highlighted? It's Government's Exhibit B.

12:18:46 19 THE COURT: On B or C?

12:18:47 20 MR. FORD: B. It's Tab C, but on the
12:18:49 21 bottom right-hand corner, it says Government
12:18:52 22 Exhibit B. It's the first page.

12:19:01 23 THE COURT: No. I don't have anything
12:19:05 24 that says Government's Exhibit B.

12:19:08 25 MR. FORD: Oh, it will say down here. So

12:19:08 1 if we flip to --

12:19:11 2 THE COURT: My only page behind C does not
12:19:13 3 have --

12:19:15 4 MR. FORD: Behind B. I apologize. I got
12:19:20 5 ahead of myself.

12:19:22 6 So let's look at that again. You can see
12:19:23 7 the highlighting. This is just a cover page of a
12:19:25 8 stack of papers where you have that sort of green, you
12:19:30 9 know, endless green highlighting we just showed you.

12:19:32 10 And you'll see it says -- now you see
12:19:34 11 where it says: Episode 272 trading in ONTX between
12:19:38 12 July 26 and August 26, 2020" on the bottom.

12:19:45 13 THE COURT: I do see that now.

12:19:46 14 MR. FORD: Yeah. And then it's
12:19:47 15 highlighted Edward Constantinescu. And then it tells
12:19:49 16 you, you know, the number of Twitter posts. And then
12:19:52 17 it says: Shares bought and sold during that time
12:19:54 18 period.

12:19:55 19 And then again she calculated, like I
12:20:01 20 said -- for the price of \$705 an hour, she calculated
12:20:04 21 he made profits of \$296 -- \$296,341.

12:20:11 22 Well, Your Honor may remember I sort of
12:20:13 23 made a big fuss about, as *Brady* material, getting
12:20:17 24 everybody's 1099s.

12:20:20 25 And this is the punch line, or one of the

12:20:22 1 punch lines to what is about to be a long not
12:20:25 2 particularly funny joke, but will have legal
12:20:28 3 significance.

12:20:28 4 If you go to the next page, this is an
12:20:30 5 excerpt from his TD Ameritrade and it shows ONTX. And
12:20:36 6 all of my client's trading in it during the year of
12:20:40 7 2020, which includes sales during -- all of the sales
12:20:45 8 during the time period.

12:20:47 9 And you will see that TD Ameritrade
12:20:49 10 concluded that he made \$297,833.04. Now, the
12:21:00 11 difference with the TD Ameritrade records is he had
12:21:03 12 also traded this stock in January. So he made \$1,591
12:21:07 13 in January.

12:21:08 14 So all you have to do is subtract that
12:21:10 15 number from 297 and you will arrive at the same number
12:21:15 16 as Ms. Garibotti did.

12:21:18 17 In other words, the data and the work that
12:21:20 18 Ms. Garibotti had done was already done by a computer
12:21:25 19 by TD Ameritrade as required under the tax laws of
12:21:28 20 this country so that they could file a 1099 on behalf
12:21:34 21 of my client, rendering the whole purpose of her being
12:21:36 22 hired and all of the work she did redundant,
12:21:39 23 superfluous, and likely to take up two weeks of trial
12:21:41 24 time that we don't need.

12:21:47 25 I have included for my client for his

12:21:50 1 substantive charges all of Ms. Garibotti's summaries,
12:21:52 2 as well as my client's relevant tax records.

12:21:56 3 Now if you flip to page D, or Tab D.

12:22:07 4 THE COURT: Let me ask, before you
12:22:10 5 leave B. And I'm looking at the 297 figure.

12:22:12 6 Are the last three transactions
12:22:13 7 transactions where he lost money?

12:22:24 8 MR. FORD: Yes.

12:22:25 9 THE COURT: Okay. All right. Go to D.

12:22:26 10 MR. FORD: So what I did for Your Honor is
12:22:28 11 I made an Excel chart. I did this -- it took me like
12:22:35 12 30 minutes once I figured out how to do this on a
12:22:39 13 calculator.

12:22:40 14 What I did is I listed the company of the
12:22:46 15 five substantive charges against my client. So
12:22:50 16 Onconova Therapeutics, line 3, Camber Energy, line 4,
12:22:54 17 DatChat, line 5, My Size, and line 6, Brickell
12:22:59 18 Biotech.

12:22:59 19 Now, we know there's 19 different
12:23:03 20 substantive charges referring to 18 different stocks
12:23:06 21 in this claim.

12:23:08 22 As it happens, for Torchlight Energy,
12:23:13 23 Alzamend Neuro, Inc. and EzFill Holdings -- sorry --
12:23:17 24 Alzamend, A-L-Z-A-M-E-N-D, Neuro, N-E-U-R-O, and then
12:23:25 25 E -- letter EzFill, F-I-L-L, Holdings, Inc.

12:23:29 1 And those are companies that my client
12:23:32 2 bought the stock for, but is not substantively
12:23:36 3 charged. So I added them so that you would have the
12:23:38 4 complete picture.

12:23:40 5 In the next column I list the stock
12:23:43 6 ticker. So we have ONTX, CEI, DATS, My Size, BBI,
12:23:47 7 Torch, AZLN, and EZFL. And then I've listed the dates
12:23:51 8 that Ms. Garibotti calculated the profits for based on
12:23:54 9 what the government told her to do.

12:23:57 10 And then under column D, the corresponding
12:24:00 11 counts in the indictment.

12:24:02 12 So, again, there's five substantive
12:24:04 13 charges against my client and three where he's not
12:24:06 14 charged but did happen to trade the stock.

12:24:12 15 So for columns E and F, I have listed
12:24:17 16 Garibotti's calculations versus the tax form
12:24:20 17 calculations. And then on column G I've given you the
12:24:25 18 deviation value and the deviation percentage. So
12:24:27 19 you'll see that on ONTX, Ms. Garibotti calculated
12:24:33 20 \$296,341. And TD Ameritrade calculated \$296,241.
12:24:40 21 That is a deviation of \$100. And a deviation of
12:24:47 22 300ths of a percent. I mean, mathematically
12:24:50 23 negligible.

12:24:57 24 It is the same for the remainder of
12:24:59 25 stocks. The complete total value for the stock

12:25:02 1 tickers my client is substantially charged with, as
12:25:05 2 well as the ones he isn't substantively charged with
12:25:08 3 but traded, Garibotti calculated \$13,619,769. And the
12:25:16 4 broker dealers who were using their computer
12:25:18 5 calculated \$13,621,074, a total deviation of \$1,305,
12:25:27 6 or nine-thousandths of a percentage deviation.

12:25:32 7 I am not challenging that this expert
12:25:35 8 knows how to do math. She certainly does. The
12:25:40 9 trouble and why there's that infinitesimal deviation
12:25:42 10 is because TD Ameritrade does the calculation based on
12:25:46 11 nanoseconds and that way they get the absolute and
12:25:49 12 most correct accurate tax reporting document.

12:25:52 13 But since the deviation favors the
12:25:56 14 government and TD Ameritrade said he made \$1,305 more
12:26:02 15 than Garibotti, we would be willing to stipulate that,
12:26:05 16 as we understand that those records are much more
12:26:09 17 accurate.

12:26:10 18 The question then that comes before us is,
12:26:12 19 why would the government have spent this extraordinary
12:26:15 20 amount of money?

12:26:16 21 We think by the time she finishes at trial
12:26:18 22 she'll have been paid probably more than many of these
12:26:21 23 individuals on trial made trading their stocks during
12:26:25 24 this time.

12:26:28 25 And the reason is, because it allowed them

12:26:29 1 to put before the Court, to put before the jury, those
12:26:38 2 large spreadsheets that purport to summarize my
12:26:42 3 client's data. But what I'm about to show you is how
12:26:44 4 it is that these documents are misleading and
12:26:46 5 manipulative.

12:26:56 6 So in order to understand 1006, the first
12:26:57 7 principle is we must understand what she is purporting
12:27:01 8 to summarize. In other words, for a summary to get
12:27:03 9 in, it must be accurate in the first place. We must
12:27:06 10 understand what is being summarized.

12:27:14 11 We're going to pull up the Excel
12:27:17 12 spreadsheet and we'll walk you through the raw data,
12:27:19 13 which while the government contends is voluminous, is
12:27:22 14 easily sortable on Excel. And we've done this many
12:27:26 15 times at trial without the need for these sort of
12:27:30 16 summaries, which my colleague representing
12:27:34 17 Mr. Rybarczyk, Mr. Rosen, will talk about, I think as
12:27:38 18 well as soon as we can get the technology going.

12:27:38 19 I apologize for the delay here. We are
12:27:38 20 working on it.

12:28:07 21 In the interim, what I'll do is -- let's
12:28:09 22 expedite it. We planned for this contingency. So
12:28:11 23 I've made some printouts.

12:28:13 24 So if we go to Tab D.

12:28:18 25 THE COURT: I'm there.

12:28:19 1 MR. FORD: This is a pre-filtered Excel
12:28:22 2 spreadsheet. Now, when you look at the full data
12:28:23 3 there is going to be a lot more, you know, that we
12:28:28 4 would filter through. But we can do this manually.

12:28:31 5 The first column B says: Order ID. Now
12:28:33 6 that reflects an order that was placed by this
12:28:39 7 individual. And each order is given its own unique
12:28:41 8 number.

12:28:42 9 Column G is the order timestamp. And that
12:28:45 10 will tell you the date and the time that the order was
12:28:48 11 placed. Column H says: Side. Now, that's whether
12:28:52 12 you're buying, selling, or shorting a stock.

12:28:56 13 Now, my client did not short any of these
12:28:58 14 stocks at issue, so you won't see short. You'll just
12:29:02 15 see buy or sell.

12:29:03 16 On order size, that's column I, it will
12:29:05 17 tell you the quantity. So in this case, that order
12:29:08 18 number that ends in 7468 was for 50,000 shares of the
12:29:14 19 symbol, which is DATS, D-A-T-S. So that's one of the
12:29:17 20 substantive charges.

12:29:18 21 The order type is a limit order. Now you
12:29:21 22 can place two types -- multiple types of orders. One
12:29:25 23 would be a market order, which -- in which you buy or
12:29:28 24 sell at the prevailing market rate. One would be a
12:29:30 25 limit order, where you basically say, Your Honor,

12:29:35 1 look, if it goes up to this price, I'll buy it. Like
12:29:38 2 I'll buy it up to \$10.

12:29:40 3 So if somebody wants to sell it to me for
12:29:40 4 \$9.50, I'll take it, but I'll take it all the way up
12:29:40 5 to 10. So selling is in reverse, right. This is as
12:29:45 6 low as I'm willing to sell it.

12:29:47 7 So in this case, a limit order, and then
12:29:49 8 column G for \$9.77 was placed for 50,000 shares of
12:29:56 9 DATS. Saying, hey, anybody who wants to sell me this
12:30:00 10 for 9.77 or less, I'll take it.

12:30:02 11 You look at action type. It then says:
12:30:05 12 Entered. And you'll see below it says routed and
12:30:08 13 routed acknowledge. I'll quickly explain what that
12:30:09 14 means.

12:30:11 15 The act my client took was to press one
12:30:13 16 key entering an order to buy 50,000 shares at a limit
12:30:18 17 price up to 9.77. Once it is ordered, it is routed
12:30:25 18 from TD Ameritrade, this is broker-dealer. TD
12:30:29 19 Ameritrade no longer has any say in the matter.

12:30:31 20 Now, they can route it to an exchange,
12:30:33 21 such as NASDAQ or the New York Stock Exchange, but as
12:30:38 22 Gary Gensler has testified before Congress during this
12:30:41 23 time period, 90 percent of orders were not going to
12:30:44 24 public lit exchanges, but rather being placed on
12:30:45 25 what's called dark pool. Now the name sounds

12:30:49 1 nefarious. It's lawful. There's nothing wrong with a
12:30:52 2 dark pool.

12:30:52 3 If you look at column BC, it shows the
12:30:56 4 destination of who it was routed to. In this case, it
12:30:58 5 was routed to Citadel. They are the largest player in
12:31:01 6 this. It's a hedge fund and a financial services
12:31:04 7 firm.

12:31:05 8 And here's what Citadel does. They have
12:31:07 9 three options. Once TD Ameritrade takes my client's
12:31:14 10 order and gives it to Citadel, they can do one of
12:31:16 11 three things: They can try to find the shares on a
12:31:17 12 public lit exchange, such as NASDAQ. They can route
12:31:22 13 it against clients that have opposing orders.

12:31:26 14 So if Citadel has an individual -- and
12:31:28 15 when I say "client," we're talking Credit Suisse,
12:31:31 16 we're talking JPMorgan. If they have a client who
12:31:34 17 wants to sell those shares at the price, they will
12:31:37 18 match it against that client.

12:31:38 19 There is a third option, which is if
12:31:41 20 Citadel itself has purchased shares of this stock,
12:31:45 21 then Citadel -- if they want to sell it, they will
12:31:50 22 sell it for that price.

12:31:51 23 So those are the three options. We do not
12:31:54 24 know what Citadel does. We would have to request
12:31:58 25 their records, but it doesn't matter for our purposes

12:32:00 1 here.

12:32:01 2 Okay. So now that the order has been
12:32:04 3 routed from TD Ameritrade to Citadel, who my client
12:32:07 4 has nothing to do with, he has no contract, there is
12:32:09 5 no privity, he has no control over Citadel's actions.
12:32:12 6 And, in fact, he has no control over who TD Ameritrade
12:32:16 7 routes it to. They can send it to an exchange. They
12:32:18 8 can send it to a dark pool. It's up to TD Ameritrade.

12:32:25 9 At that point, once its acknowledged,
12:32:29 10 Citadel begins the process of what's called filling
12:32:30 11 the order. Now, Citadel has got a tough task. They
12:32:31 12 have to find 50,000 shares that somebody is willing to
12:32:35 13 sell for 9.77 or less. So look how it unfolds.

12:32:39 14 At 9:19:25, they find 71 shares. That
12:32:46 15 goes. At 9:17:57, they find 100 shares. And then we
12:32:53 16 can continuing to go down and we see all these
12:32:55 17 different times.

12:32:56 18 Now, when we flip to the next page, you
12:33:01 19 can look on that screen or in your binder, when we
12:33:03 20 flip to the next page, we have a whole 'nother page of
12:33:07 21 fills still happening. We flip yet again to a third
12:33:10 22 page we have a whole set of fills happening. And it's
12:33:13 23 not till the fourth page that that order gets filled.

12:33:17 24 At which point, something would ding on
12:33:20 25 Mr. Constantinescu's computer or phone saying your

12:33:22 1 order has been filled. All of this happens without
12:33:25 2 his knowledge or understanding.

12:33:26 3 He now places another order at 9:19 for
12:33:31 4 50,000 shares. This one gets routed to NKnight, also
12:33:36 5 one of the largest financial services firm that does
12:33:38 6 this sort of dark transactions, although, again, I say
12:33:42 7 it could ultimately be lit.

12:33:45 8 So NKnight is the one who is going to wind
12:33:47 9 up filling this order. And it begins as a redo. Now,
12:33:49 10 this is -- what I'm showing you is not the full. This
12:33:52 11 is two orders that take place over five minutes.

12:33:54 12 So what happened during this time is my
12:33:58 13 client he -- he took two actions. Remember, we're
12:34:02 14 under 1348. Under 1348, an element is that the client
12:34:07 15 engaged in an act in connection with the purchase or
12:34:10 16 sale of securities. The actus reus, Your Honor, is
12:34:15 17 the act of placing the order, entering the order.

12:34:19 18 As I'm going to continue and put a
12:34:23 19 punctuation on this. But before I do, I want you to
12:34:25 20 think about an analogy. You go to an ATM. You want
12:34:30 21 to take out 500 bucks. You put your card in, enter
12:34:34 22 your key, less 500 bucks. The ATM's empty.

12:34:38 23 The bank goes out to somebody else who has
12:34:40 24 some cash, says, hey, you got any cash for me. They
12:34:43 25 say, all we got is these 500 \$1 bills. We'll take it.

12:34:47 1 They take the 500 \$1 bills. They load them into the
12:34:50 2 ATM. And the ATM spits out five \$100 bills to you.

12:34:57 3 You have not engaged in 500 independent
12:35:00 4 acts. You haven't gone to the ATM 500 times. And you
12:35:04 5 didn't ask the ATM to do 500 different things. And
12:35:06 6 you certainly didn't ask a third party to do 500
12:35:08 7 different things.

12:35:09 8 What you asked is for a single order for
12:35:13 9 this amount of shares, 50,000 shares, to be placed.
12:35:16 10 Or in the case of the ATM, you asked for \$500.

12:35:20 11 The reason this is so critical -- and you
12:35:23 12 can turn back to your binder or we can pull it up on
12:35:26 13 page F. Had Ms. Garibotti made a chart that looked --
12:35:38 14 that's her original.

12:35:40 15 So had Ms. Garibotti made a chart that
12:35:48 16 accurately reflected the actions that my client
12:35:51 17 engaged in, rather than the actions of several random
12:35:54 18 entities, such as Citadel and NKnight, it would appear
12:35:59 19 as in Tab E of your binder, or we're pulling it up
12:36:05 20 here.

12:36:09 21 Yeah. So this would be a hypothetical
12:36:12 22 chart of Ms. Maria Garibotti, had she have summarized
12:36:14 23 the actions of my client and not the actions of
12:36:17 24 unknown third parties.

12:36:19 25 And so if -- you can flip back now to

12:36:23 1 page -- to Tab A. And you see, right. Look at --
12:36:32 2 there is -- we'll scroll. There is just nothing but
12:36:35 3 green out in front of us. It looks like he engaged in
12:36:41 4 150 transactions. But if you look at this other one,
12:36:44 5 he only engaged in a handful.

12:36:46 6 Now, I'm about to show you why this is
12:36:48 7 important and why all of her exhibits need to be
12:36:50 8 excluded. Because if we now flip to the next page in
12:36:56 9 chapter -- I'm sorry -- in Tab E, after the revised
12:37:03 10 ones, I have gotten rid of the color coding and I have
12:37:08 11 summarized what had my client actually did.

12:37:10 12 So he placed one, two, three, four, five,
12:37:14 13 six, seven, eight buy orders; not 150 buy orders
12:37:18 14 during this time. And she is right, he did then place
12:37:22 15 sell orders after that time.

12:37:25 16 By including endless rows of green
12:37:29 17 fabricated orders that my client didn't enter, but
12:37:33 18 rather represent fills, what she does, if we flip to
12:37:38 19 two pages after this, is it gives the false impression
12:37:42 20 to the jury that he did something other than what he
12:37:45 21 actually did.

12:37:46 22 Remember, they keep telling you he sold
12:37:48 23 and he didn't believe in the stock because he sold.
12:37:51 24 But look at what he actually does. If we go to this
12:37:55 25 one. Right after those four sell orders, or five sell

12:37:59 1 orders that occur starting at 10:36 a.m. and going to
12:38:03 2 10:49, he turns around at 2:22 p.m. and he enters a
12:38:08 3 series of huge buy orders.

12:38:11 4 This is a guy who believes in this stock.
12:38:14 5 100,000 shares of DATS at a limit price of 10.88.
12:38:18 6 100,000 shares of DATS at a limit price of 10.49.
12:38:22 7 20,000 at a limit price of 11.26. 20,000 at a limit
12:38:26 8 price of 11.29. 100,000 at a limit price of 11.25.

12:38:33 9 I need my calculator, or Ms. Garibotti to
12:38:35 10 help me, but I think we're talking about 5 or
12:38:38 11 \$6 million worth of shares.

12:38:41 12 But if we go back to what they did under
12:38:46 13 Tab A, they've made it look -- this is huge green
12:38:50 14 representing fills. And then getting to this one
12:38:54 15 tweet with these red lines under it. But it is not an
12:38:57 16 accurate picture.

12:38:59 17 Your Honor, these exhibits need to be
12:39:01 18 excluded wholesale for two independent reasons. The
12:39:08 19 first I mentioned was because Ms. Garibotti was hired
12:39:13 20 solely for calculating profits.

12:39:15 21 And TD Ameritrade has already done it and
12:39:17 22 they've done a better job with zero deviation and
12:39:20 23 they're on our exhibit list. We'll put those in and
12:39:22 24 we'll even go so far as to stipulate to the profits he
12:39:26 25 made.

12:39:26 1 Number two, the charts that they had her
12:39:28 2 make are not summaries of any of these defendants'
12:39:31 3 conduct. They're summaries of fills made by
12:39:35 4 independent, unknown third parties. And, therefore,
12:39:38 5 don't reflect the actus reus of our clients.

12:39:43 6 If you will entertain me, I will quickly
12:39:45 7 show you one more example, which relates to
12:39:48 8 Mr. Hrvatin. And I really think you will see the
12:39:50 9 degree to which these exhibits are misleading.

12:39:54 10 If we flip to Tab F, where we'll show you
12:39:57 11 on this screen. I just -- we'll scroll through this.
12:39:59 12 Just look at this conduct. It purports to be the
12:40:02 13 conduct of Mr. Hrvatin over a very short period of
12:40:05 14 time, like maybe a day or something like that. Just
12:40:08 15 look at this that they did.

12:40:19 16 They were going to go before the jury and
12:40:20 17 say that Mr. Hrvatin took these actions.

12:40:23 18 Now, if we go to Tab H, I went through and
12:40:27 19 I pulled Mr. Hrvatin's trade records. I followed
12:40:32 20 Ms. Garibotti's color scheme, which I don't, frankly,
12:40:34 21 like, but I followed it anyhow.

12:40:37 22 Now look at what he actually did during
12:40:39 23 that exact same period.

12:40:41 24 THE COURT: What tab are you under?
12:40:42 25 Because it's not H.

12:40:45 1 MR. FORD: Oh, sorry. G.

12:40:52 2 That's what actually happened. And we'll
12:40:53 3 go back to show you again that endless stream of red,
12:40:57 4 green, and yellow. I mean, look at this. It goes on
12:40:58 5 for longer than a country mile.

12:41:01 6 Now let's go -- we'll go back to H and see
12:41:04 7 what Mr. Hrvatin actually did. This is what he
12:41:06 8 actually did.

12:41:08 9 And Ms. Bloom, can we just go back to the
12:41:14 10 prior one quickly.

12:41:17 11 What this has allowed the government to do
12:41:19 12 and to present is they can make it seem like these
12:41:24 13 individuals tweeted and then sold and sold and sold
12:41:28 14 and sold, right. There was pump and dump, they called
12:41:32 15 it.

12:41:32 16 Now we'll go back to Exhibit G in this
12:41:35 17 binder. And look at what he actually did. The entire
12:41:39 18 time this is going on, for roughly a 24-hour period,
12:41:45 19 he is entering orders of 100,000 and then selling
12:41:47 20 orders of 100,000. Flipping it back and forth, back
12:41:51 21 and forth.

12:41:52 22 But what's illustrative now, Your Honor,
12:41:56 23 in this new exhibit that I have created to show how
12:41:58 24 misleading theirs is, Mr. Hrvatin buys and then
12:42:03 25 tweets. Tweets and then buys. Tweets and then sells.

12:42:06 1 Tweets and does nothing.

12:42:09 2 This chart in and itself reflects that
12:42:11 3 there was no pattern or rhythm to the way that he was
12:42:13 4 tweeting or buying and selling. In fact, it looks a
12:42:19 5 lot more like I understand what these individuals to
12:42:21 6 do.

12:42:21 7 On the one hand, they're day trading,
12:42:23 8 they're doing their jobs, they're making money. On
12:42:25 9 the other hand, they love the attention and the
12:42:27 10 celebrity of being influencers.

12:42:29 11 So they're tweeting about it so that they
12:42:31 12 can be guys who say, hey, I just made all this money
12:42:34 13 on this stock and look at this car, right. And, hey,
12:42:38 14 you know, maybe I can teach you some of the rules of
12:42:40 15 the road and tricks of the trade.

12:42:41 16 But these are fundamentally different.
12:42:45 17 And what Ms. Garibotti is purporting to put before
12:42:50 18 this Court and before the jury, it cannot come in. It
12:42:54 19 needs to be excluded wholesale. It represents fills
12:42:59 20 and not buys or sells of these defendants and,
12:43:02 21 therefore, does not summarize their conduct.

12:43:05 22 And respectfully, Your Honor, I'm
12:43:06 23 requesting at a minimum that all charts that mention
12:43:12 24 Mr. Constantinescu be excluded. But what should
12:43:18 25 happen, and the only fair result is that all of these

12:43:22 1 charts with regard to the 19 counts are excluded
12:43:26 2 against all of these defendants.

12:43:33 3 THE COURT: All right.

12:43:34 4 MR. FORD: And one final piece.

12:43:37 5 Mr. Rosen -- there is other independent
12:43:43 6 reasons why these are misleading under 403, but I am
12:43:46 7 primarily making -- and he will address those. I am
12:43:48 8 primarily making a challenge under 1006 and 401
12:43:54 9 relevancy that she never needed to be hired. We don't
12:43:57 10 need her to testify about profits. I can save two
12:44:00 11 weeks on the trial by just -- if we all just put our
12:44:03 12 tax records in and, you know, stipulate to that, which
12:44:06 13 I'm certainly willing to do.

12:44:07 14 And then, number two, this doesn't
12:44:09 15 summarize the defendants' conduct, Your Honor. The
12:44:12 16 actus reus is the buying and selling of stock. They
12:44:14 17 can't put in a chart summarizing the conduct of
12:44:18 18 Citadel and NKnight and TD Ameritrade and purport that
12:44:22 19 it summarizes our clients' actions. It's too
12:44:25 20 misleading for the jury.

12:44:30 21 THE COURT: Mr. Rosen, you want to add on?

12:44:32 22 MR. ROSEN: Yes, thank you.

12:44:43 23 We filed a motion at 532 that primarily
12:44:46 24 addresses a couple different issues. But the first
12:44:47 25 really is these charts contain completely inadmissible

12:44:52 1 and unreliable hearsay. The charts focus on two --
12:44:58 2 focus on the fact that the DOJ has been trying to find
12:45:06 3 some witness to testify that these statements are
12:45:10 4 false and misleading. They can't do that. They
12:45:10 5 haven't found anyone.

12:45:12 6 So what they have done is they've created
12:45:13 7 these charts with Dr. Garibotti that simply say they
12:45:21 8 color these -- all these rows yellow and simply say
12:45:23 9 those are false and misleading because the DOJ alleges
12:45:26 10 that they are false and misleading.

12:45:28 11 It's important to note these are not
12:45:30 12 demonstrative charts. These are supposed to be
12:45:32 13 substantive evidence.

12:45:34 14 The first criteria is -- of a substantive
12:45:36 15 evidence chart under 1006 is that the chart is based
12:45:41 16 on competent evidence already before the jury. The
12:45:43 17 DOJ's allegations by definition are not competent
12:45:48 18 evidence. They are, at best, an argument for closing
12:45:54 19 in a demonstrative and should nowhere be before the
12:45:59 20 jury.

12:45:59 21 There's actually a jury instruction
12:46:02 22 under -- in 1.05 that specifically says that the
12:46:05 23 government's allegations are not evidence.

12:46:07 24 This is critical, highly problematic for
12:46:10 25 the jury, you know, for a couple reasons. One, these

12:46:14 1 charts, which, you know, are attached to our motion --
12:46:18 2 and I have other examples here -- I don't know how
12:46:22 3 much we need to go through, but the jury is going to
12:46:25 4 rely on this color coding back in the jury room to
12:46:27 5 make decisions and there's no way we can undue that
12:46:30 6 once it's done.

12:46:31 7 There is no jury instruction that can say
12:46:34 8 once a chart has been admitted into evidence certain
12:46:37 9 portions of that chart are no longer admissible. So
12:46:39 10 we can't have a jury instruction that will correct for
12:46:42 11 that.

12:46:43 12 It violates the defendants' Sixth
12:46:48 13 Amendment right to confront the witnesses against
12:46:49 14 them. *Crawford* makes this abundantly clear. These
12:46:54 15 are testimonial hearsay charts. Allegations of
12:46:57 16 falsity that they're using for the truth of the
12:46:59 17 matter. It's obviously reversible error to allow a
12:47:02 18 witness to testify to bring into evidence opinions of
12:47:08 19 the DOJ without any ability to cross-examine those --
12:47:12 20 that witness.

12:47:13 21 We have no ability to call the DOJ. We
12:47:15 22 have no idea whose allegations those directly are.
12:47:19 23 But we do know they're not Dr. Garibotti's. She
12:47:21 24 disclaims them. The government has said that they're
12:47:24 25 not hers.

12:47:25 1 So we're faced with this conundrum of
12:47:27 2 there is going to be falsity allegations and we have
12:47:30 3 no one to cross-examine. And that's a massive
12:47:34 4 problem, obviously, that every rule of hearsay is
12:47:38 5 designed to exclude.

12:47:39 6 The government's response to our brief is
12:47:43 7 nonsensical and, frankly, contradictory. They claim
12:47:47 8 that Garibotti is not providing opinions, she's just
12:47:50 9 providing facts. But then they say, well, the DOJ
12:47:53 10 allegations are certainly opinions and those are going
12:47:56 11 to be in the charts.

12:47:57 12 So you can't have it both ways. They're
12:47:59 13 either her opinions in the chart; they're either
12:48:01 14 admissible evidence, which they're not; but you can't
12:48:03 15 say she's only applying -- she's only supplying facts
12:48:07 16 when she clearly isn't.

12:48:09 17 The government claims that the color
12:48:11 18 coding will help reduce the jury's confusion about
12:48:14 19 what statements are at issue. And I think the
12:48:16 20 government misses the point on that.

12:48:18 21 In order to be on a chart, in order to be
12:48:20 22 competent evidence, you have to -- it has to be
12:48:23 23 competent evidence, so in order to even be admissible
12:48:25 24 in the first place. You can't bring in DOJ
12:48:28 25 allegations onto a 1006 chart.

12:48:32 1 The jury will simply be confused. They'll
12:48:33 2 view the highlighted allegations as accurate. And
12:48:37 3 it's obviously extremely prejudicial to us. It
12:48:41 4 violates at least three rules of evidence: 602, 702,
12:48:45 5 804, and the Sixth Amendment.

12:48:47 6 The government claims that these charts
12:48:50 7 containing DOJ allegations are not unusual. The DOJ
12:48:56 8 provides not a single example of any other court in
12:49:00 9 America that has ever had a Rule 1006 chart that
12:49:04 10 contains DOJ allegations not prepared by the witness
12:49:08 11 who is testifying at trial.

12:49:11 12 In our binder that we presented earlier,
12:49:14 13 Your Honor, we dug up from what appears to be
12:49:18 14 Mrs. Garibotti's only trial that she's testified in as
12:49:20 15 a summary witness and we looked at those charts that
12:49:22 16 were admitted by the judge. It's in the back of your
12:49:27 17 binder that we presented earlier. It's from Vorley,
12:49:30 18 it's a Northern District of Illinois case.

12:49:40 19 THE COURT: I only have ten binders.

12:49:40 20 MR. ROSEN: Okay. So yeah. It's a --

12:49:54 21 THE COURT: I can't find it. Summarize
12:49:54 22 it.

12:49:55 23 MR. ROSEN: I'll summarize it.

12:49:56 24 They're trading charts of orders placed by
12:49:59 25 real traders, professionals who do this for a living,

12:50:01 1 for banks and things like that. I reviewed the 100
12:50:05 2 pages of exhibits, not a single one contains any
12:50:09 3 so-called government allegations.

12:50:11 4 And those were obviously -- those were
12:50:12 5 fiercely contested exhibits anyway. They sort of
12:50:17 6 barely squeaked in, but not a single one contains what
12:50:20 7 the government is trying to do here.

12:50:21 8 They've relied on two Fifth Circuit cases,
12:50:23 9 not one of which is applicable at all. One is about a
12:50:28 10 records analyst who spread bank sheets and said which
12:50:31 11 expenses were personal, which were for business.
12:50:34 12 Another one is about meals at a healthcare center,
12:50:37 13 extrapolations from the evidence critically.

12:50:42 14 The very -- the prime difference beyond
12:50:43 15 obviously the subject matters, those witnesses were
12:50:46 16 available for cross-examination. Sixth Amendment
12:50:50 17 requires that. Here, they are not.

12:50:53 18 The error cannot be harmless is the final
12:50:55 19 point that I want to make. 54 exhibits. These are
12:51:01 20 the prime exhibits targeting defendants. For some
12:51:03 21 stocks, these are the only exhibits. This is what the
12:51:07 22 government's relying upon to prove their case.

12:51:10 23 The Fifth Circuit has routinely -- and I
12:51:13 24 cite multiple cases in our brief -- flipped verdicts
12:51:17 25 when summary charts are based on incompetent evidence,

12:51:19 1 which is what the government is doing now.

12:51:21 2 I can't -- there's not a lot we can
12:51:23 3 guarantee, but I do believe that if these charts come
12:51:27 4 in with their allegations, we will be doing this trial
12:51:30 5 again, which is what none of us want.

12:51:32 6 We've already discussed the profit issue.
12:51:35 7 I don't want to beat that. I know it's getting late.
12:51:37 8 I don't want to beat that. I'm happy to answer any
12:51:40 9 questions about that.

12:51:42 10 And, finally, this one final point from --
12:51:47 11 about Mrs. Garibotti's charts. They establish
12:51:49 12 conspiracy where none existed; meaning, that they
12:51:52 13 layered defendant upon defendant trading records and
12:51:55 14 tweets and some messages against each other to make it
12:51:58 15 look like they're all trading in sync.

12:52:05 16 A, that's not what the chart shows, but,
12:52:08 17 more importantly, there is trading from one person,
12:52:10 18 who has never communicated, for example, with my
12:52:11 19 client. There is trading that contradicts each other.
12:52:15 20 There is trading that -- for people who are -- you
12:52:17 21 know, have no messages between them. It's done to --
12:52:22 22 it's argumentative. It's meant to prove a point.
12:52:24 23 It's meant to show the jury that these people are
12:52:26 24 acting in synch, when that's for the evidence to prove
12:52:29 25 and the government simply does not do that. Using a

12:52:31 1 summary chart like that is impermissible.

12:52:37 2 THE COURT: Mr. Armstrong, you want to
12:52:38 3 respond?

12:52:39 4 MR. ARMSTRONG: Your Honor, I would defer
12:52:41 5 to you. That was a long presentation. I don't really
12:52:42 6 think I heard a terribly compelling argument. I'm
12:52:45 7 happy to answer any questions or I can just give you
12:52:49 8 an example --

12:52:49 9 THE COURT: Well, I'm primarily concerned,
12:52:50 10 although I understand Mr. Ford's argument, and the
12:52:56 11 most persuasive thing he said to me was it would
12:52:59 12 shorten the trial.

12:53:02 13 But I'm primarily concerned about what
12:53:04 14 Mr. Rosen brought up, which are these comments in the
12:53:07 15 middle of the summary chart.

12:53:09 16 MR. ARMSTRONG: I'm not even sure what
12:53:10 17 he's talking about. So just to show you, for example,
12:53:12 18 Your Honor.

12:53:13 19 Ms. Kim, if we can please pull up
12:53:16 20 Government Exhibit 3B. And Ms. Kim, if you could
12:53:35 21 please go to page 3 of 3 -- actually, page 1.

12:53:44 22 This is the chart that was put together
12:53:45 23 for Count 3. It shows the cover page with the time
12:53:49 24 period, so four days, September 1, 2020, to September
12:53:56 25 14, 2020. It shows who was trading during this

12:54:00 1 window, number of shares bought, number of shares
12:54:04 2 sold, and the profit.

12:54:05 3 Just to kind of set the table, as I
12:54:08 4 mentioned before, here is the window of time. And
12:54:10 5 here is the activity captured during this window of
12:54:12 6 time.

12:54:13 7 Page 2, please, Ms. Kim. And, Ms. Kim, if
12:54:22 8 you could please go down to page -- starting at the
12:54:24 9 top, lines 1 through 50, please.

12:54:26 10 So the color coding is not nefarious.
12:54:32 11 It's just the nature of this case.

12:54:33 12 And so what happens is first in the green,
12:54:36 13 lines 1 through 9, Mr. Deel gets in his shares for the
12:54:40 14 stock SXTC, and you know that because green in her
12:54:46 15 chart is buys. And then, because there is so many
12:54:54 16 things going on at once, we interlaid text messages;
12:54:57 17 in this case, Discord messages.

12:55:00 18 So here there are Discord messages
12:55:03 19 between, on line 10, Mr. Deel and Mr. Hennessey --
12:55:08 20 between Mr. Deel and Mr. Hennessey, where Mr. Deel
12:55:11 21 tells Mr. Hennessey about his plans and what he plans
12:55:15 22 to do with SXTC.

12:55:18 23 And then on line 13 Mr. Deel also Discord
12:55:22 24 messages Mr. Rybarczyk and he tells him what he plans
12:55:25 25 to essentially tweet on the next couple of days of

12:55:30 1 trading.

12:55:31 2 And so then if you go down, Ms. Kim,
12:55:39 3 please. If you go to page 3, please. Go down,
12:55:46 4 please, a little more. Stop. A little more, Ms. Kim,
12:55:55 5 please. I apologize, I don't have a hard copy up here
12:55:57 6 with me.

12:55:57 7 So top of page 4, please, Ms. Kim.

12:56:02 8 So they're going back and forth about what
12:56:03 9 the tweets should actually say. And Mr. Rybarczyk
12:56:06 10 gives Mr. Deel a free lesson. Just to make sure it's
12:56:09 11 more appealing and if you're adding 100,000 to
12:56:12 12 200,000, they'll likely be enticed to add with size.

12:56:15 13 So he's talking about how you can make
12:56:17 14 your tweet more appealing to the followers so they'll
12:56:20 15 actually buy this stock after you post.

12:56:24 16 Take that down, please, Ms. Kim.

12:56:25 17 And you can see what happens, lines 65
12:56:30 18 through 74, is that Mr. Deel takes Mr. Rybarczyk's
12:56:36 19 advice and he posts, both on line 65 and line 71. He
12:56:42 20 posts the message that he talks about with
12:56:44 21 Mr. Rybarczyk about how to entice people to buy. And
12:56:47 22 those are in yellow because those are what we allege
12:56:50 23 to be false. Those two statements right there. Okay?

12:56:56 24 THE COURT: Is this thing that looks like
12:57:00 25 pink actually supposed to be yellow?

12:57:02 1 MR. ARMSTRONG: I'm sorry, Your Honor?

12:57:05 2 THE COURT: Where I'm looking at the

12:57:06 3 chart -- I don't know if you can see it. On mine, the

12:57:08 4 top one is -- looks like line 65 to Gary Deel. And

12:57:14 5 then it says SXTC added 100K.

12:57:14 6 MR. ARMSTRONG: Yes.

12:57:19 7 THE COURT: Okay. That's a tweet; right?

12:57:21 8 MR. ARMSTRONG: Correct. You see that
12:57:23 9 in --

12:57:23 10 THE COURT: Twitter. Okay.

12:57:25 11 MR. ARMSTRONG: Yeah. So he double taps
12:57:25 12 it, so he both posted it on Twitter, as you see --

12:57:28 13 THE COURT: Okay. And then you follow it
12:57:30 14 in a time sequence down to 9:32 and we have a Discord
12:57:37 15 post also by Mr. Deel.

12:57:39 16 MR. ARMSTRONG: Correct. So --

12:57:41 17 THE COURT: This is a -- I assume a
12:57:47 18 quote from the Discord post.

12:57:47 19 MR. ARMSTRONG: Yes, Your Honor. That is
12:57:48 20 the content of his both Twitter post and Discord post.

12:57:54 21 So that kind of sets the table and that
12:57:59 22 explains the colors as to the various moving parts.

12:58:01 23 THE COURT: Well, except this doesn't show
12:58:03 24 me anything that's yellow that Mr. Rosen was talking
12:58:06 25 about.

12:58:06 1 MR. ARMSTRONG: Line 65 and line 71, those
12:58:09 2 are supposed yellow charts that have drawn the ire of
12:58:13 3 the defendants.

12:58:14 4 THE COURT: Well, it's -- I thought that
12:58:15 5 y'all were just highlighting that for me. So those --
12:58:16 6 where it says Gary Deel Discord post, see now it's not
12:58:19 7 yellow.

12:58:21 8 MR. ARMSTRONG: Sorry, Ms. Kim and I are
12:58:22 9 kind of working in tandem. Line 65 and line 71 -- if
12:58:29 10 you could not, please, highlight anything, Ms. Kim.

12:58:29 11 MR. FORD: It's showing up a pinkish hue
12:58:33 12 because of this monitor, but those two pinkish lines
12:58:35 13 you're seeing, that's what we're talking about.

12:58:36 14 MR. ARMSTRONG: Lines 65 and 71.

12:58:38 15 MR. FORD: And if they blow up the screen
12:58:39 16 a little bit more, you'll see there's a column on the
12:58:40 17 right that says the word "false." And then they put
12:58:42 18 the number 1 --

12:58:44 19 THE COURT: Okay. That's what I want to
12:58:45 20 see.

12:58:47 21 MR. ARMSTRONG: Where is that, Mr. Ford?
12:58:53 22 It's not in the chart. Please show us where that is
12:58:58 23 on the chart.

12:58:58 24 MR. FORD: What is the function of
12:59:00 25 highlighting -- Your Honor, our position is they're

12:59:06 1 highlighting them --

12:59:06 2 THE COURT: My position, Mr. Ford, is I
12:59:08 3 don't see anything yellow. Show me the yellow.

12:59:13 4 MS. EPLEY: Your Honor, if I may, I think
12:59:15 5 yours is a computer screen issue. I have a hard copy
12:59:18 6 I'd be happy to show the Court. So that you can see
12:59:20 7 it's --

12:59:21 8 THE COURT: Show me the hard copy.

12:59:24 9 MR. ARMSTRONG: Your Honor, at the end of
12:59:25 10 the day, we're talking about shades of yellow. But
12:59:29 11 the operative -- please, please, I'm speaking, please,
12:59:33 12 please, please.

12:59:33 13 (Parties speaking simultaneously.)

12:59:34 14 MR. FORD: If you look at Tab A of your
12:59:36 15 binder, if you look at Tab A, the first page, you'll
12:59:37 16 see it's like three lines down, there is an example of
12:59:42 17 the yellow highlighting.

12:59:46 18 If you look in Tab A, it's just a
12:59:48 19 different example. It says DATS. It's line 3 --

12:59:55 20 MR. ARMSTRONG: We're not talking about
12:59:56 21 DATS.

12:59:57 22 MR. FORD: -- 29. It says
12:59:57 23 (indiscernible) --

12:59:57 24 THE COURT: Show me one in person.

13:00:05 25 MS. EPLEY: Can I give you a random

13:00:07 1 example?

13:00:07 2 THE COURT: And hopefully it's readable.

13:00:10 3 MS. EPLEY: It's tiny. I apologize.

13:00:12 4 THE COURT: Okay. And this thing that's
13:00:13 5 light brown, is that really yellow?

13:00:15 6 MS. EPLEY: Yes.

13:00:17 7 THE COURT: Okay. But here's what I'm not
13:00:22 8 understanding, Mr. Rosen. So help me here. What I
13:00:31 9 hear -- and maybe I'm not hearing correctly, but what
13:00:33 10 I hear Mr. Armstrong saying is these are just quotes
13:00:37 11 from tweets.

13:00:40 12 MR. ROSEN: There is a little bit of a
13:00:43 13 sleight of hand Mr. Armstrong --

13:00:44 14 MR. ARMSTRONG: There is no --

13:00:44 15 (Parties speaking simultaneously.)

13:00:46 16 MR. ROSEN: There is.

13:00:46 17 What he doesn't say is that the tweets are
13:00:48 18 colored two different colors. One, tweets are white.
13:00:52 19 Other tweets are yellow. The white tweets are those
13:00:57 20 alleged to be true by the DOJ. It says that.

13:01:01 21 THE COURT: Where does it say that?

13:01:02 22 MR. ROSEN: It says that -- so it's in
13:01:04 23 small print. But, remember, these are going back to
13:01:07 24 the jury. Which ones --

13:01:10 25 MS. EPLEY: I believe it's page 6 in

13:01:13 1 the --

13:01:14 2 MR. ROSEN: Okay. There is notes at the
13:01:17 3 bottom of their compilation chart.

13:01:21 4 MS. EPLEY: At the bottom of page 6, Your
13:01:21 5 Honor.

13:01:25 6 MR. ROSEN: Yeah.

13:01:25 7 THE COURT: Okay. I have page 41 of 70.

13:01:28 8 MR. ROSEN: Is there a -- there are -- the
13:01:32 9 examples are all the same, is their notes at the
13:01:35 10 bottom of that --

13:01:39 11 THE COURT: No. The problem is no one can
13:01:44 12 show me an example of what you're complaining about.

13:01:46 13 MS. EPLEY: I have a theory, and I don't
13:01:47 14 want to besmirch Mr. Armstrong, so this is really
13:01:50 15 question, but for clarity.

13:01:53 16 The first Garibotti charts we were
13:01:54 17 provided, provided a column that not only indicated
13:01:57 18 the statement was false, but rows would be highlighted
13:02:00 19 in yellow. So there's two different visual
13:02:03 20 distinctions in the graph itself.

13:02:04 21 Underneath the charts in Footnotes 2 and
13:02:07 22 3, the government injected phrasing related to false
13:02:09 23 statements. It's objectively hearsay, and, frankly, a
13:02:12 24 conduit for the government opinion through a summary
13:02:15 25 witness.

13:02:15 1 Later they remove the column indicating
13:02:17 2 false. And I am guessing by his indignation he has
13:02:22 3 since removed from phrasing at the bottom.

13:02:24 4 Is that accurate?

13:02:25 5 MR. ROSEN: No. The phrasing is still on.
13:02:26 6 Let me just --

13:02:29 7 MR. ARMSTRONG: They're talking about
13:02:29 8 Whac-A-Mole. This is ridiculous.

13:02:29 9 (Parties speaking simultaneously.)

13:02:29 10 MR. ROSEN: Your Honor --

13:02:31 11 THE COURT: Well, the problem -- one of
13:02:32 12 the problems is, I can't -- this is such tiny print.

13:02:35 13 MR. ROSEN: They are -- but it's critical
13:02:38 14 and it's important.

13:02:38 15 There are four notes at the bottom of the
13:02:41 16 page there. I can read them into the record. Two,
13:02:44 17 the second -- the number 2: There are a total of 11
13:02:48 18 allegedly false Twitter or Discord posts by Eddie
13:02:52 19 Constantinescu.

13:02:53 20 There are additional 43 Twitter or Discord
13:02:56 21 posts, text messages, or direct messages that
13:02:59 22 reference the ticker identified by the DOJ.

13:03:03 23 So the first part is, they're saying
13:03:05 24 allegedly false, even though she has nothing to do
13:03:08 25 with saying they're allegedly false.

13:03:12 1 Note 3. This is a critical note. Green
13:03:16 2 highlighted rows indicate buy. I don't have a problem
13:03:19 3 with that.

13:03:20 4 Red highlight rows indicate sell. I don't
13:03:23 5 have a problem with that.

13:03:24 6 White highlighted rows -- this is what was
13:03:28 7 left out of the presentation -- indicate tweet or
13:03:31 8 Discord messages from the trader that are not flagged
13:03:35 9 as allegedly false.

13:03:38 10 Yellow highlighted rows indicate allegedly
13:03:41 11 false tweet and Discord messages from the defendant
13:03:46 12 during the episode.

13:03:49 13 Blue highlighted rows indicate text
13:03:52 14 messages and direct messages identified by the DOJ.

13:03:57 15 That's what we're complaining about, the
13:03:59 16 color coding, the white versus -- if they wanted to
13:04:01 17 color the tweets white, we wouldn't be here.

13:04:04 18 But they're differentiating, they're
13:04:06 19 including DOJ allegations Mrs. Garibotti knows nothing
13:04:09 20 about and color coding their chart. That's entirely
13:04:12 21 hearsay and it's extremely impermissible and
13:04:15 22 prejudicial.

13:04:18 23 It's also on the very first page of the
13:04:20 24 exhibit. There's more notes. When they purportedly
13:04:29 25 type up the number of Twitter posts and the number of

13:04:32 1 Discord notes, they put a little note, a caveat. They
13:04:35 2 say: Number of Twitter posts and Discord posts
13:04:36 3 represents the number of public Twitter posts and
13:04:39 4 Discord messages respectively by a trader during the
13:04:43 5 episode that either have been alleged to be false by
13:04:47 6 the DOJ or refer to the ticker at issue.

13:04:50 7 That's also hearsay. That's
13:04:52 8 impermissible. It serves no purpose on a Rule 1006
13:04:55 9 chart. And I'm a little surprised that when, going
13:04:58 10 through, they didn't highlight the difference between
13:04:59 11 the yellow and the white, because they know that's --
13:05:02 12 they know that's the part of our brief that we cared
13:05:05 13 about and yet they glossed over it in presenting
13:05:09 14 something that -- and not acknowledging that. That's
13:05:12 15 why we're here. That's why we had to come back and
13:05:15 16 explain it. And it would be -- you know, and that's
13:05:17 17 what our problem is.

13:05:19 18 MR. ARMSTRONG: Your Honor, I let these
13:05:21 19 guys drone on for infinite amount of time. And you
13:05:23 20 can see on the screen, what Mr. Rosen is talking about
13:05:26 21 is the white tweet that we were going to get to before
13:05:29 22 I had 17 trillion people interrupt me.

13:05:32 23 So if we could have some fundamental
13:05:34 24 decorum, I think it would be helpful for everyone in
13:05:38 25 this case.

13:05:39 1 MS. EPLEY: For purposes of the record,
13:05:41 2 having been a federal prosecutor, I'm a little
13:05:43 3 indignant by the idea --

13:05:45 4 THE COURT: Don't, don't, don't, don't,
13:05:47 5 don't.

13:05:50 6 MS. EPLEY: Thank you.

13:05:51 7 THE COURT: Okay. Let me just make it
13:05:52 8 simple.

13:06:00 9 I will allow these summary charts. And
13:06:03 10 the problem raised by Mr. Ford I think is a matter of
13:06:09 11 cross-examination.

13:06:11 12 MR. ARMSTRONG: Thank you, Judge.

13:06:12 13 THE COURT: But I'm not -- wait, wait.

13:06:13 14 I'm not allowing them with any comments or
13:06:17 15 color coding that indicate something that DOJ thinks
13:06:21 16 is true or false or, you know, that, you know, it has
13:06:29 17 extra information like we counted 1,000 of these. And
13:06:35 18 I'm using one because the one I can read here says
13:06:38 19 these are three of 55 or something.

13:06:41 20 Now, obviously if the witness knows that
13:06:42 21 she can testify to that. She can say, I counted them
13:06:45 22 and these are what they are. But informational
13:06:49 23 footnotes, is what I'll refer to these as, or color
13:06:53 24 coding are out.

13:06:55 25 MS. EPLEY: Thank you. May I have that

13:06:57 1 sheet back?

13:06:59 2 THE COURT: You can have both of them.

13:06:59 3 MR. FORD: Your Honor, while we're at it,
13:07:01 4 there's a couple other things.

13:07:03 5 You'll see at the top it lists -- it went
13:07:06 6 away, but it will say something like episode 272, even
13:07:09 7 though we're only talking about 19 stock ticker at
13:07:13 8 issue time period.

13:07:14 9 So to put episode 272 suggests that
13:07:18 10 something is happening that they're no longer
13:07:20 11 alleging, that there's hundreds of these. So we would
13:07:22 12 like that removed.

13:07:24 13 They also failed to include Francis Sabo's
13:07:28 14 Twitter handle, which suggests that Francis Sabo
13:07:31 15 doesn't have a Twitter handle. It's just left blank.
13:07:34 16 And then they put a dash under where Francis Sabo,
13:07:37 17 their cooperating witness, tweeted about it. And we
13:07:40 18 think they should be required to include his tweets,
13:07:42 19 rather than a dash as that's misleading.

13:07:50 20 I would like some clarity as to, you know,
13:07:53 21 the cross-examination issue. In the sense that
13:08:00 22 cross-examining -- I'm not understanding how or why I
13:08:05 23 could cross the government on attributing actions to
13:08:08 24 my client that he didn't take. The third parties --

13:08:15 25 THE COURT: Wait, wait, wait. He took

13:08:17 1 them. And I'm going off what you just gave me a
13:08:25 2 primer on. I mean, he ordered the sells. He ordered
13:08:30 3 the buys. And it just took time for them to be
13:08:33 4 executed by the third-party company that does that
13:08:38 5 kind of thing.

13:08:39 6 And I think you can cross-examine the
13:08:44 7 witness and say, well, you understand that just
13:08:47 8 because he puts an order in, it's not filled right
13:08:50 9 away. And if she doesn't understand, she's going to
13:08:52 10 say, no, I don't know that.

13:08:56 11 And you've already made your point that
13:08:58 12 she doesn't know what she's talking about.

13:09:01 13 MR. FORD: Your Honor, if I could go back
13:09:02 14 to two points. One is they originally told us that
13:09:04 15 she was being called a summary witness to summarize
13:09:07 16 profits, but we already have the evidence in the
13:09:10 17 record that summarizes the profit. So she's not
13:09:12 18 necessary.

13:09:12 19 But with regards to this buying and
13:09:14 20 selling and whether it's a cross-examination issue,
13:09:18 21 these charts are not admissible under 1006. They're
13:09:21 22 not summaries of my client's conducts. They're
13:09:25 23 summaries of the actions of an independent third
13:09:29 24 party, not even TD Ameritrade but a third-party
13:09:31 25 removed.

13:09:32 1 What she's summarizing is the way that
13:09:34 2 these were filled, which I will grant is the correct
13:09:36 3 way to summarize this for purposes of calculating
13:09:39 4 profits.

13:09:39 5 But it does not -- it is not a summary of
13:09:43 6 the data --

13:09:43 7 THE COURT: Well, and I think that is
13:09:44 8 something you can bring out in cross.

13:09:48 9 MR. FORD: Understood.

13:09:49 10 THE COURT: I mean, because otherwise -- I
13:09:50 11 mean, you've conceded the numbers are almost exactly
13:09:53 12 alike. Now, admittedly, perhaps TD Ameritrade
13:09:59 13 might -- numbers may be more accurate, may be less
13:10:03 14 accurate. I think the government is entitled to put
13:10:05 15 on the evidence based on the way it's summarized.

13:10:13 16 What I'm not allowing is any kind of
13:10:15 17 comment or extraneous material. I'm all right with
13:10:20 18 color coding, you know, a certain color for buys, a
13:10:24 19 certain color for sells and a certain color for tweets
13:10:29 20 or -- what's the other thing we've got going on?

13:10:33 21 MR. ARMSTRONG: Discord posts.

13:10:34 22 THE COURT: Discord. I'm all right with
13:10:34 23 that.

13:10:36 24 But I'm not color coding, we actually
13:10:40 25 believe this one is true and this one isn't true and

13:10:44 1 any comments in footnotes or anywhere else that show
13:10:48 2 up. I'm not allowing those into evidence.

13:10:54 3 MR. FORD: Thank you, Your Honor.

13:10:55 4 THE COURT: Mr. Reyes, do you have
13:10:56 5 something to add?

13:10:57 6 MR. REYES: Yes, just briefly.

13:11:00 7 With regards to these charts, the other
13:11:03 8 additional issue is that they are absolutely
13:11:06 9 incomplete in terms of purporting to represent
13:11:09 10 everything the defendant said during this relevant
13:11:12 11 time. They exclude many statements --

13:11:14 12 THE COURT: Wait, wait, wait. Did the
13:11:16 13 charts say that? That this is everything every
13:11:19 14 defendant said?

13:11:20 15 MR. REYES: It does not say --

13:11:22 16 THE COURT: If we did that, we wouldn't
13:11:23 17 have a summary. We'd have --

13:11:25 18 MR. REYES: And my only point in saying
13:11:27 19 that, Your Honor, is that if these charts are going to
13:11:29 20 come in like this, we would like to reserve the right
13:11:34 21 to amend our exhibit list quickly to make exhibits out
13:11:41 22 of the evidence that's not purported here.

13:11:43 23 This is --

13:11:45 24 THE COURT: Well, I mean, I always assumed
13:11:46 25 that was going to be your cross-examination.

13:11:49 1 MR. REYES: Absolutely.
13:11:50 2 THE COURT: Here's your summary, you left
13:11:52 3 out this and you left out this and you left out this.
13:11:54 4 I mean, I just assumed that was par for the course.

13:11:58 5 MR. REYES: 100 percent. If we amend the
13:12:03 6 exhibit list, you know, the next few days, and I
13:12:04 7 anticipate the government might object, I just wanted
13:12:06 8 to preview that --

13:12:08 9 THE COURT: Well, I'm going to allow y'all
13:12:10 10 to cross the summary expert, the timeline expert,
13:12:13 11 whoever -- however you want to characterize him or
13:12:16 12 her, with, you know, you left out this, you left out
13:12:20 13 that. I mean, I'm assuming -- I mean, I've always
13:12:23 14 assumed that was coming.

13:12:25 15 MR. REYES: Thank you, Your Honor.

13:12:25 16 THE COURT: All right.

13:12:25 17 MS. CORDOVA: Your Honor, before we move
13:12:33 18 on, on the first page it says: Episode 332,
13:12:37 19 Episode 397.

13:12:38 20 Did Your Honor make a ruling on that,
13:12:40 21 whether that could come in? We think it's highly
13:12:42 22 prejudicial and irrelevant.

13:12:43 23 THE COURT: Well, what do the episodes,
13:12:44 24 Mr. Armstrong, what are they supposed to represent?
13:12:46 25 Like all the trades in a certain stock?

13:12:51 1 MR. ARMSTRONG: No. So the episode tally
13:12:55 2 was originally the 394 --

13:12:58 3 THE COURT: Well, let's either number
13:13:00 4 them -- let me nip this in the bud. And it's going to
13:13:05 5 actually be good.

13:13:07 6 I just tried a three-week trade secret
13:13:12 7 case where, on the last day of trial, we figure out
13:13:19 8 that the plaintiff's numbering system and the
13:13:23 9 defendant's numbering system was different. And so
13:13:30 10 when they were talked about trade secret number 1, the
13:13:33 11 plaintiff was talking about one secret and the defense
13:13:36 12 was talking about another. Let me tell you, that made
13:13:39 13 the charge fun.

13:13:42 14 So I would do something, you know,
13:13:48 15 simplistic but also neutral, that ties it either to
13:13:52 16 the stock or to the count. So if it's a stock related
13:14:01 17 to ONX [sic] or whatever stock, you know, just put --
13:14:07 18 instead of episode 20, just put the stock's name. And
13:14:14 19 I think that's -- and then the jury can follow that.

13:14:15 20 And given this experience, I'll tell you
13:14:18 21 I'm not going to formally tell them, but I will
13:14:23 22 probably informally tell them as part of preliminary
13:14:26 23 instructions that they may want to take notes that
13:14:29 24 way.

13:14:32 25 Because when the jury got all said and

13:14:33 1 done at the end of this trade secret -- I mean, they
13:14:36 2 were flipping notes. Because, you know, they took
13:14:39 3 notes on trade secret 1, it turned out to be trade
13:14:43 4 secret 4. You know, it was just a mess.

13:14:48 5 So my strong suggestion is that you --
13:14:51 6 let's label things on both sides with regard to the
13:14:56 7 stock in question. Because the stock is tied to the
13:15:00 8 count, except for the -- obviously the conspiracy
13:15:04 9 count. And that'll make it a lot easier and it will
13:15:11 10 solve the other problem.

13:15:16 11 MR. LIOLOS: Your Honor, just on that
13:15:17 12 point, so you're aware, we have organized our exhibit
13:15:19 13 list by that. So something that pertains to Count 2
13:15:24 14 is in a stack of GX 2A, B, C, D, E; 3A, B, C, D, E.

13:15:29 15 THE COURT: See, and I think that is fine.
13:15:30 16 And that's neutral. The reference to the stock and an
13:15:33 17 A, B, C, I don't think anybody can complain about
13:15:37 18 that.

13:15:45 19 Let's take a lunch break. Let's be back
13:15:50 20 at 2:00.

13:15:52 21 (Court in recess.)

14:14:39 22 THE COURT: All right. Be seated.
14:14:49 23 Okay. I do not know with respect to Judge
14:15:00 24 Hoyt's courtroom, whose courtroom we're going to be
14:15:03 25 using, if it has a lack of heat or not. But this

14:15:20 1 courtroom has traditionally been an icebox.

14:15:22 2 All right. I went over -- we've talked
14:15:25 3 about Maria Garibotti, but in that same motion it
14:15:34 4 addressed Peter Melley.

14:15:40 5 And, Mr. Ford, this is your motion. If
14:15:44 6 you want to -- is there something about Mr. Melley
14:15:46 7 that we need to address or is it the same issue?

14:15:51 8 MR. FORD: The same issues as raised in
14:15:53 9 Mr. Rybarczyk's motion. So Mr. Rosen is going to
14:15:57 10 handle that.

14:15:59 11 THE COURT: Okay. Way to throw him under
14:16:03 12 the bus.

14:16:08 13 MR. ROSEN: Our objection, Your Honor, to
14:16:11 14 Mr. Melley is very narrow. We don't think he's ever
14:16:16 15 testified as an expert in this type of thing. He is a
14:16:19 16 fact witness from FINRA. He typically testifies in
14:16:22 17 many trials around the country as to certain terms,
14:16:26 18 like stock or shares or exchange.

14:16:29 19 And we object narrowly to his
14:16:33 20 definition -- some of the definitions that he has
14:16:35 21 chosen to use, particularly related to pump and dumps.
14:16:38 22 We believe that's a legal conclusion that someone has
14:16:41 23 committed a crime and we don't believe it's proper
14:16:48 24 testimony for an expert, and certainly not test -- not
14:16:49 25 proper for Mr. Melley, who we have not discovered

14:16:52 1 anything that relates to how he could properly define
14:16:55 2 a pump and dump.

14:16:56 3 We went through his trial transcripts from
14:16:59 4 previous testimony. I didn't see any -- I reviewed
14:17:03 5 them, like you did, in terms of searching, a control F
14:17:08 6 for pump or dump and I haven't found anything.

14:17:10 7 But, more importantly, we also think that
14:17:14 8 under 702, Mr. Melley's opinions as to what a pump and
14:17:19 9 dump is are unreliable and likely to prejudice the
14:17:22 10 jury.

14:17:23 11 For example, the SEC defines pump and
14:17:27 12 dumps one way. They talk about false and misleading
14:17:29 13 statements about a company, which results in frenzied
14:17:34 14 buying, followed by a price that plummets when the
14:17:36 15 hyping of stock stops.

14:17:37 16 FINRA also talks about this pump, followed
14:17:40 17 by false and misleading statements about a company,
14:17:43 18 followed by a subsequent dump of shares.

14:17:46 19 Mr. Melley sort of ignores those two
14:17:51 20 agencies, says that a pump and dump is a stock
14:17:53 21 manipulation scheme that attempts to boost the price
14:17:56 22 of a stock or security through false, misleading, or
14:17:59 23 greatly exaggerated statements; in other words, it's a
14:18:03 24 pump and dump with no dump.

14:18:04 25 And so that's, you know, one thing to show

14:18:08 1 that this is not reliable testimony. Again, we have
14:18:11 2 no beef with him testifying as to what a share is and
14:18:14 3 certain simple things, but legal conclusions like pump
14:18:19 4 and dump we believe are off limits, because they're
14:18:21 5 way too suggestive and subject to too much -- you
14:18:27 6 know, not enough rigor. Not enough -- under the
14:18:30 7 *Daubert* analysis, not enough tested expertise as to
14:18:34 8 what it actually is.

14:18:36 9 So I'll leave it at that. Unless you have
14:18:39 10 any other questions, that's our objection to
14:18:42 11 Mr. Melley.

14:18:42 12 MR. FORD: Your Honor, one issue to raise.
14:18:45 13 We addressed Ms. Garibotti and Mr. Melley
14:18:48 14 in the same motion because of the causation issue.
14:18:51 15 They have tucked in, after their, you know, pages of
14:18:54 16 definitions he's going to give, a little line where
14:18:57 17 they say he's going to testify that on days where, you
14:19:02 18 know, these defendants bought or sold a stock, he
14:19:04 19 noticed that the volume changed or that the price
14:19:07 20 changed.

14:19:08 21 So, again, they plan to have him take the
14:19:11 22 stand and give a correlation, which we are concerned
14:19:13 23 will be confused with causation. So I understand that
14:19:17 24 the causation motion is under advisement, but it's all
14:19:21 25 part of the same pieces as concerns Melley.

14:19:26 1 THE COURT: Who from the government wants
14:19:27 2 to respond?

14:19:28 3 MR. LIOLOS: I will, Your Honor.

14:19:30 4 Just to touch on that last point first,
14:19:32 5 Mr. Melley is not going to testify about the
14:19:35 6 defendants' trading conduct specifically. So I think
14:19:37 7 that should eliminate Mr. Ford's concern.

14:19:37 8 THE COURT: All right.

14:19:42 9 MR. LIOLOS: As to his qualifications to
14:19:44 10 testify and define pump and dump, the list of cases
14:19:49 11 that is attached to his disclosure, I don't know how
14:19:54 12 hard Mr. Rosen looked at it, but the *Gaito* case is the
14:19:58 13 accountant for the infamous wolf of Wall Street,
14:20:03 14 Jordan Belfort. You can't get more pump and dumpy
14:20:07 15 than that.

14:20:07 16 Mr. Melley testified in that trial.
14:20:09 17 Explained to the jury what a pump and dump is and the
14:20:11 18 things surrounding it.

14:20:12 19 There are a number of other cases there in
14:20:13 20 which he's done it, EDNY cases, Central District of
14:20:17 21 California, case from 2019. He's testified in over 40
14:20:21 22 cases. And he estimates that about half of them have
14:20:24 23 some variation of this.

14:20:26 24 To the extent that there is a disagreement
14:20:28 25 in terms of how his understanding of the term, gained

14:20:33 1 from 30 years, give or take, investigating these types
14:20:39 2 of things in the market, testifying about them, to the
14:20:39 3 extent that there is a disagreement between that
14:20:41 4 definition and what the SEC has offered, that goes to
14:20:46 5 the weight and they're free to cross him on it --
14:20:50 6 they're free to cross him on his understanding of the
14:20:51 7 term and how it's used in the industry, built up over
14:20:55 8 his many decades of experience. It doesn't go to the
14:20:57 9 admissibility of his testimony.

14:20:59 10 And to the point about it being a legal
14:21:01 11 conclusion, he's not even going to be talking about
14:21:02 12 their conduct. So it's not the legal conclusion under
14:21:07 13 704.

14:21:08 14 THE COURT: Okay. All right. I'm going
14:21:11 15 to allow his testimony as narrow as it was just
14:21:15 16 described.

14:21:17 17 But I will remind everybody that we're not
14:21:21 18 asking the jury -- the jury will be asked zero
14:21:23 19 questions about a pump and dump. So keep that in
14:21:29 20 mind, you know, before we expend too much time and
14:21:32 21 effort on that issue.

14:21:37 22 All right. Okay. Let's go to
14:22:06 23 Document 541, which is Hennessey's individual motion
14:22:10 24 in limine.

14:22:23 25 A new face.

14:22:27 1 MR. MURTHA: Yes, Your Honor. Mr. Murtha
14:22:28 2 on behalf of Mr. Hennessey.

14:22:29 3 I'm happy to take them in any order you
14:22:32 4 want, but I can start with Number 1 if you would like.

14:22:32 5 THE COURT: Go ahead.

14:22:34 6 MR. MURTHA: Your Honor, I know you've
14:22:35 7 previously said that you recognize that there's not a
14:22:37 8 fiduciary duty or some regulatory duty here.

14:22:40 9 We would ask also that the government not
14:22:43 10 be permitted to assert that the defendants had any
14:22:45 11 duty to alert their followers of any of their sales or
14:22:49 12 their decisions to sell.

14:22:53 13 There is no duty that requires them to
14:22:54 14 alert their followers that they were choosing to sell
14:22:57 15 stocks. And any arguments to the contrary would be
14:22:59 16 prejudicial and misleading.

14:23:01 17 Relatedly, we would ask that -- and we
14:23:04 18 included this in our proposed jury instructions, that
14:23:06 19 if there's going to be arguments about any duty, the
14:23:10 20 jury should be instructed that they're only -- the
14:23:13 21 defendants are only required to disclose information
14:23:15 22 if they speak on a particular subject.

14:23:18 23 So it's not enough for the government to
14:23:19 24 come up here and say -- or tell the jury that because
14:23:21 25 they talked about stocks, they have to tell their

14:23:24 1 followers everything at all possible regarding stocks.

14:23:28 2 The law, specifically under *SEC versus
Mapp*, an Eastern District of Texas case, states that a
14:23:30 3 duty to speak the full truth is related to a
14:23:33 4 particular subject. So the defendant has to actually
14:23:36 5 speak about a particular subject before he can be --
14:23:39 6 determined to be under a duty to provide further
14:23:44 7 information on that subject.

14:23:47 8 In the case of selling a stock, the
14:23:49 9 defendant would have to say something about, I intend
14:23:51 10 to sell a stock at some time and then potentially --
14:23:55 11 we're not conceding that they would be under a duty,
14:23:58 12 but that's what *Mapp* would say. There could
14:24:01 13 potentially down the line be a duty.

14:24:03 14 So the government should not be allowed to
14:24:05 15 argue anything to the contrary.

14:24:06 16 THE COURT: Mr. Armstrong, do you have any
14:24:07 17 problem with that? I mean, it seems pretty
14:24:10 18 straightforward.

14:24:10 19 MR. ARMSTRONG: I was listening to it.
14:24:16 20 The only thing that we would potentially have a
14:24:18 21 problem with is the line about no duty to talk about
14:24:23 22 sales. That just goes hand in hand with the false
14:24:28 23 statements that we're alleging.

14:24:29 24 THE COURT: Well, and I -- the way I

14:24:35 1 interpreted what Mr. Murtha just said was that, you
14:24:40 2 know, you don't have a duty until you speak on a
14:24:41 3 topic. And once you speak on it, then you have a duty
14:24:44 4 to tell the truth.

14:24:49 5 MR. ARMSTRONG: No issue with that.

14:24:50 6 THE COURT: And so with that exception,
14:24:51 7 I'm granting the motion as far as arguing that
14:24:54 8 Mr. Hennessey, or any of the other defendants, are
14:25:00 9 fiduciaries or have some kind of legal, due to the SEC
14:25:06 10 or some other law or regulation, duty to disclose.

14:25:09 11 MR. ARMSTRONG: We're not going to argue
14:25:11 12 that.

14:25:12 13 THE COURT: Yeah. All right.

14:25:13 14 Mr. Murtha, you want to talk about the
14:25:16 15 next one, presenting evidence or argument that's
14:25:18 16 contrary to the SEC's definition of "long."

14:25:29 17 Is that really an issue here?

14:25:29 18 MR. MURTHA: So the government intends to
14:25:31 19 present a contrary definition to long. So the SEC
14:25:33 20 defines "long," and the government is going to --

14:25:36 21 THE COURT: Tell me how the SEC defines
14:25:38 22 "long."

14:25:39 23 MR. MURTHA: So the SEC defines "long" as
14:25:42 24 having a position in a security; meaning, that you own
14:25:44 25 the security, according to the SEC's own website.

14:25:46 1 The government is going to call Mr. Melley
14:25:49 2 and he is going to testify, contrary to that
14:25:51 3 definition, that: The most common meaning of the term
14:25:55 4 "long" generally involves a measure of time and refers
14:25:58 5 to the length of time an investment is held.

14:26:03 6 This is a critical issue here because by
14:26:06 7 creating a different definition, the government is
14:26:09 8 going to attack some of Mr. Hennessey's tweets and
14:26:12 9 state that he committed some fraud or lied to his
14:26:15 10 followers because he used -- he was not telling the
14:26:18 11 followers that he was intending to sell down the line.

14:26:22 12 The SEC's definition does not have a
14:26:24 13 temporal requirement. Mr. Melley's definition does.

14:26:31 14 So a good example of this would be from
14:26:31 15 the superseding indictment, the government alleges
14:26:33 16 that Mr. Hennessey tweeted: I am long surf -- that's
14:26:35 17 Surface Oncology -- at around 9:51.

14:26:40 18 He then states that Mr. Hennessey began
14:26:41 19 selling shares at 10:04. So 13 minutes later. There
14:26:45 20 is nothing wrong with that conduct. There is nothing
14:26:50 21 illegal about that conduct.

14:26:51 22 But the government is going to have --

14:26:51 23 THE COURT: Tell me how you interpret your
14:26:53 24 own client's use of the word "long" there.

14:26:56 25 MR. MURTHA: So Mr. Hennessey is stating I

14:26:59 1 own shares of Surf. I am long Surf. I own shares.

14:27:02 2 So when he tweets that at 9:51 and he does
14:27:05 3 in fact own shares, there is nothing fraudulent.

14:27:08 4 There is no lie there. He, in fact, owns shares.

14:27:14 5 Now, the government is going to have
14:27:15 6 Mr. Melley state that there is some temporal
14:27:18 7 requirement. They don't state what that temporal
14:27:21 8 requirement is. The fact that Mr. Hennessey owned a
14:27:23 9 share for even a millisecond, though, when he tweeted
14:27:24 10 that, means that he was in fact long, according to the
14:27:28 11 SEC's own definition.

14:27:29 12 And it should be noted that the SEC is the
14:27:34 13 regulatory body that gets to decide what that term
14:27:36 14 means. Congress gave the SEC the authority to
14:27:40 15 regulate the stock market.

14:27:42 16 Mr. Melley is going to create -- or come
14:27:42 17 up and testify about this temporal requirement
14:27:46 18 definition, but he hasn't disclosed where he got this
14:27:49 19 definition from. It's his own opinion that's in
14:27:52 20 direct contradiction to the SEC.

14:27:53 21 So we would argue and ask the Court that
14:27:56 22 Mr. Melley not be allowed to change the definition
14:27:59 23 that the SEC has. If there's any definition of long
14:28:02 24 that's provided to the jury, it should only be the one
14:28:04 25 that the SEC has published.

14:28:12 1 MR. LIOLOS: Two points on this. The
14:28:13 2 first is Mr. Murtha just stood here and said four or
14:28:15 3 five times that there's no temporal aspect to the
14:28:19 4 SEC's definition. That's wrong. It's quoted in their
14:28:21 5 own brief on page 4.

14:28:23 6 The second sentence says: Investors
14:28:25 7 maintain long security positions in the expectation
14:28:29 8 that the stock will rise in value in the future.

14:28:33 9 It's right in the SEC's definition. It's
14:28:35 10 right in their own brief.

14:28:36 11 To the extent Mr. Melley uses different
14:28:41 12 language than that, it's on the basis of his 30-plus
14:28:44 13 years of experience investigating these things in the
14:28:46 14 market. They can cross him on how it's different, if
14:28:51 15 it is at all --

14:28:51 16 THE COURT: What is his definition?

14:28:54 17 MR. LIOLOS: The most common meaning of
14:28:56 18 the term "long" generally involves a measure of time
14:28:57 19 and refers to the length of time an investment is
14:28:59 20 held, along with another -- several other sentences of
14:29:02 21 context that say, an investor goes long when the
14:29:05 22 investor believes the stock's price will rise in the
14:29:08 23 future, which is right in the SEC's definition, and
14:29:10 24 the investor intends to hold the stock to realize that
14:29:13 25 expected future price appreciation.

14:29:17 1 He's elaborating on the concept within the
14:29:19 2 SEC's definition. It's not that different.

14:29:21 3 THE COURT: I'm going to deny this one.
14:29:24 4 You can cross him on, that, counsel.

14:29:30 5 All right. The next one is testimony that
14:29:34 6 the defendants profited -- and I think we've already
14:29:39 7 covered that.

14:29:40 8 Basically, I'm allowing testimony that
14:29:44 9 they profited on the stocks that are in the
14:29:47 10 indictment. I mean, we've all gone through that.
14:29:52 11 We've gone through the TD Ameritrade records and
14:29:57 12 whatever. So that I think is coming in.

14:30:01 13 Then we get to the ones I -- really the
14:30:06 14 one I was waiting for, "pump and dump" and "victim."

14:30:10 15 MR. MURTHA: Yes, Your Honor. So we would
14:30:11 16 argue that pump and dump and victim, the government
14:30:13 17 should be precluded from using these inflammatory and
14:30:17 18 inapplicable phrases, as multiple people have already
14:30:20 19 talked about.

14:30:20 20 The government has conceded that it does
14:30:22 21 not have to prove that the defendants caused any
14:30:25 22 inflation. So the term "pump and dump" is just simply
14:30:29 23 irrelevant here. That part has already been discussed
14:30:33 24 enough.

14:30:33 25 What I'd like to focus on is that multiple

14:30:37 1 Courts have ruled and held that pejorative terms,
14:30:39 2 similar to pump and dump, should not be presented to
14:30:42 3 the jury.

14:30:43 4 A pump and dump suggests that something
14:30:45 5 nefarious, illegitimate and unlawful occurred without
14:30:49 6 the government doing any of the work to meet its
14:30:51 7 burden to prove beyond a reasonable doubt that a pump
14:30:55 8 and dump or some unlawful activity occurred.

14:30:57 9 Courts have precluded the government or
14:30:59 10 plaintiffs from saying terms like "shell company" or
14:31:03 11 "hate crime," or most relevant for us, "Ponzi scheme"
14:31:06 12 or "Enron," for the very reason that it's prejudicial,
14:31:10 13 misleading. It's not requiring the government or the
14:31:12 14 plaintiff to carry their burden. It's simply
14:31:15 15 something to try to prove the point without actually
14:31:20 16 putting forth any evidence.

14:31:21 17 The government tries to argue that
14:31:23 18 essentially defendants opened the door to these terms
14:31:26 19 by using terms "pump and dump" themselves. But
14:31:30 20 it's -- the government is stretching the point here.
14:31:30 21 As I think Mr. Ford referenced earlier, the phrase
14:31:39 22 "pump" simply means -- it's like cheerleading. So for
14:31:43 23 me, a Dallas Cowboys fan, I'm pumped up when they
14:31:46 24 play, although they usually let me down. It's the
14:31:49 25 same thing when they're tweeting about pumps.

14:31:51 1 It doesn't mean that they're admitting to
14:31:52 2 any illegal scheme or using the term "pump and dump"
14:31:56 3 in some legal sense. Pump is pretty much synonymous
14:32:00 4 with cheerleading or cheering on a stock.

14:32:03 5 So the fact that they use it in their own
14:32:05 6 tweets does not mean that they have admitted to
14:32:07 7 anything unlawful or that the government should be
14:32:09 8 allowed to use that phrase. In fact, the government
14:32:13 9 shouldn't because of its decision to concede
14:32:16 10 causation.

14:32:16 11 Similarly, the term "victim" should not be
14:32:18 12 used. The government is obviously free to call
14:32:22 13 alleged victims and have them testify. But it should
14:32:26 14 not introduce them as victims. It should not claim
14:32:28 15 that they are victims.

14:32:31 16 Victim automatically denotes that someone
14:32:35 17 has been harmed by a crime. A crime has not been
14:32:38 18 proven here. The government has the burden to prove
14:32:41 19 that and they should not be allowed to label somebody
14:32:43 20 a victim, tell the jury in opening statements that
14:32:45 21 they're going to bring victims in front of the jury or
14:32:47 22 anything like that. They need to meet their burden
14:32:50 23 and use the evidence to do it.

14:32:53 24 THE COURT: Okay. All right. I'm
14:32:54 25 granting your motion as to the word "victim," but

14:32:57 1 denying it as to "pump and dump."

14:33:03 2 MR. MURTHA: Thank you, Your Honor.

14:33:07 3 Ms. Cordova is going to take on the
14:33:09 4 remainder of these arguments.

14:33:19 5 THE COURT: All right.

14:33:19 6 MS. CORDOVA: A tough act to follow, but
14:33:19 7 I'll do my best.

14:33:19 8 THE COURT: We're to the stocks outside of
14:33:19 9 the top 54.

14:33:19 10 MS. CORDOVA: So, Your Honor, the
14:33:21 11 government charged 19 counts, substantive stock fraud
14:33:24 12 counts. The government is attempting -- initially
14:33:31 13 attempted to expand the indictment substantially to
14:33:34 14 397. And then it says, no, we'll do 54 episodes.

14:33:38 15 But our position is that even those 54
14:33:41 16 episodes are outside the terms of the indictment.
14:33:43 17 Outside of what the grand jury indicted.

14:33:46 18 And as we articulated in our first motion
14:33:49 19 to dismiss Counts 8, 9, and 11, the false statements
14:33:53 20 that constitute a securities fraud charge are
14:33:56 21 essential key facts to a securities fraud charge.

14:34:04 22 And so those key facts have to be found by
14:34:06 23 a grand jury. They cannot be constructively amended
14:34:08 24 by the government to expand an indictment and include
14:34:11 25 more than the 19 counts alleged in the indictment.

14:34:11 1 And that is what the government is trying to do.

14:34:20 2 So our position is that nothing should
14:34:21 3 come in beyond the 19 charged counts. And to the
14:34:25 4 extent Your Honor allows that, it certainly should not
14:34:28 5 go beyond the 54, because that would be unfair
14:34:30 6 surprise and unduly prejudicial.

14:34:33 7 THE COURT: All right. Mr. Armstrong or
14:34:36 8 who from the government wants to...

14:34:38 9 MR. ARMSTRONG: I mean, Judge, I think
14:34:39 10 we're actually in agreement, that we're not going
14:34:42 11 beyond 54.

14:34:43 12 In fact, I'll be terribly surprised if we
14:34:46 13 get into all 54 at trial. We're going to be as
14:34:49 14 efficient and direct as possible. And so we just need
14:34:54 15 to have the latitude going on the front end as to that
14:35:00 16 corpus of 54.

14:35:00 17 MR. FLEITES: May I be heard, Your Honor?

14:35:00 18 THE COURT: Yes.

14:35:00 19 MR. FLEITES: Carlos Fleites on behalf of
14:35:03 20 Mr. Hrvatin.

14:35:04 21 This issue is particularly important with
14:35:06 22 regards to my client as he's only charged in two of
14:35:10 23 the 19 counts. But of the 54, I believe 20 involve
14:35:15 24 him.

14:35:16 25 So by that rationale, very little of what

14:35:20 1 the jury -- I'm sorry -- what the grand jury charged
14:35:23 2 is part of what's going on. But to allow all those
14:35:27 3 other counts would be a lot of information that wasn't
14:35:29 4 charged and it hurts him specifically.

14:35:34 5 MR. WILLIAMS: Your Honor, this particular
14:35:36 6 part of their motion implications -- this part of
14:35:44 7 Mitchell Hennessey's motion implicates at least three
14:35:45 8 other pleadings that have been filed, both by myself,
14:35:47 9 Mr. Constantinescu, and then another by Mr. Hennessey.

14:35:50 10 If you'd like to address the extraneous
14:35:52 11 episode question at this time, I'm ready to do that.

14:35:57 12 THE COURT: Well, quite frankly, I was
14:36:00 13 going to put it off till tomorrow, but let's do it
14:36:03 14 now.

14:36:03 15 MR. WILLIAMS: Okay. So as Your Honor has
14:36:06 16 heard, initially the government started with 397
14:36:09 17 episodes.

14:36:10 18 At some point, they pared it down, using
14:36:13 19 their parlance, to 19. Because there are only 19
14:36:16 20 stocks charged in the indictment. We've objected to
14:36:20 21 anything beyond those 19, the additional 35 under 403
14:36:23 22 and 611.

14:36:24 23 Now, this is going to lengthen this trial
14:36:29 24 substantially and unnecessarily and improperly. And
14:36:34 25 the reason why, it's important to think about it in

14:36:36 1 terms of the original 19 is 19 is a lot. This.

14:36:40 2 Is not an indictment that charges
14:36:41 3 securities fraud with respect to one stock. And then
14:36:45 4 they say, oh, it's just a one-off and then the
14:36:47 5 government would come back and say, no, it's not, let
14:36:49 6 us show you some others.

14:36:51 7 They've charged 19 substantive counts,
14:36:54 8 most of which impact many defendants beyond just those
14:36:57 9 charged.

14:36:58 10 For example, my client's charged in six
14:37:02 11 substantive counts, but he's implicated, if you look
14:37:04 12 at page 1 of Dr. Garibotti's summary charts, in 17 of
14:37:10 13 the 19.

14:37:17 14 Now, that Government Exhibit 2A through
14:37:17 15 whatever, through 55, that's 145 government exhibits,
14:37:20 16 so seven on average each.

14:37:22 17 My client -- I can't speak to everyone
14:37:24 18 else's -- but for the substantive counts, we have more
14:37:26 19 than 200 exhibits dealing with those same 19 episodes.

14:37:33 20 Once we move beyond that and we start
14:37:35 21 talking about 35, the additional 35 and the 19, then
14:37:39 22 that's Government's Exhibit 21 through 55, for a total
14:37:42 23 of 101 additional exhibits. And, remember, many of
14:37:45 24 these are dozens of pages.

14:37:47 25 For example, the Garibotti summary charts.

14:37:51 1 There is one of those for every single of the 54
14:37:54 2 episodes. Dozens of pages. Some of these episodes go
14:37:58 3 100 days. Some are one day. But most of them are
14:38:01 4 weeks at a time, months at a time. And that's an
14:38:05 5 average of three each for the extraneous.

14:38:07 6 Now, they don't use the same exhibit
14:38:09 7 protocol with respect to the extraneous. So, for
14:38:12 8 example, there's a volume price chart that's usually
14:38:16 9 the first exhibit, then there's the Garibotti chart,
14:38:18 10 then there's a post and volume chart. And then
14:38:21 11 there's some individual tweets and Discord messages
14:38:24 12 when you look at the first 19 exhibits of the episodes
14:38:27 13 of the government's exhibits.

14:38:29 14 As they trickle into the next 35, there
14:38:32 15 are some variation of those -- of that combination.
14:38:35 16 There's very rarely all of each. In many cases, as my
14:38:38 17 colleague pointed out, there is really just only the
14:38:41 18 Garibotti chart.

14:38:42 19 Each of these episodes involves different
14:38:47 20 combinations of defendants. Different time periods.
14:38:49 21 Obviously different tickers. And so they're not
14:38:51 22 intertwined. They're different stocks, different time
14:38:54 23 periods, different combinations of defendants. So
14:38:57 24 they're extraneous acts.

14:38:59 25 But they're unnecessary and they're

14:39:01 1 cumulative. Remember, this isn't something that we
14:39:04 2 could say is a one-off, it's one stop. The government
14:39:06 3 has addressed -- excuse me -- charged 19 episodes in
14:39:10 4 the indictment.

14:39:10 5 If they can't prove it with 19, why should
14:39:13 6 we give them an additional 35? The jury is either
14:39:16 7 going to get it at the end of 19 or they're not.

14:39:19 8 And so this is where 403 comes into play,
14:39:22 9 because it's time wasting and it's cumulative and it
14:39:24 10 will confuse them as to the 19 charged.

14:39:27 11 And Your Honor has the discretion and the
14:39:30 12 authority, under Rule 611, to limit evidence and to
14:39:35 13 control the presentation of the evidence to avoid
14:39:38 14 exactly those problems.

14:39:41 15 And I know others would like to speak on
14:39:44 16 this in particular but, Judge, this goes towards what
14:39:49 17 you said was the most persuasive thing you heard
14:39:52 18 earlier. How do we shorten this trial?

14:39:55 19 We're talking about 19 mini-trials of 19
14:39:58 20 stocks with an overarching conspiracy. That's
14:40:01 21 complicated enough. That's hundreds and hundreds of
14:40:02 22 exhibits just from the government and my client alone.

14:40:06 23 That's hundreds, probably thousands of
14:40:08 24 pages, once you actually look at those charts. Where
14:40:11 25 people are going to be cross-examining Dr. Garibotti

14:40:15 1 or others about different things that we heard about,
14:40:17 2 whether it's a -- you put an order in and then it's
14:40:20 3 filled across, you know, dozen of sellers. So you're
14:40:26 4 going to have lawyers cross-examining, as is their
14:40:28 5 right to confront and cross-examine Dr. Garibotti and
14:40:31 6 others, over these dozens of page exhibits, across a
14:40:34 7 dozen and a half stocks. That's going to be our
14:40:37 8 summer. We add 35 to that, we're here for Christmas.

14:40:42 9 THE COURT: No, it's not.

14:40:44 10 MR. WILLIAMS: Your Honor, I hope you're
14:40:45 11 right. But I really want to emphasize that when you
14:40:50 12 look at the volume of exhibits that you have before
14:40:52 13 you that have been prefiled by these defendants, look
14:40:55 14 at the volume that address just the substantive
14:40:59 15 counts. The government's. It's not just Exhibit 1 to
14:41:02 16 55. It's 1 and then the letters of the alphabet. 2,
14:41:05 17 the letters of the alphabet; 3.

14:41:08 18 And to rebut that, each defendant -- each
14:41:12 19 count as unique to them or their alleged involvement
14:41:15 20 in it or it shows up on Garibotti's chart, has to deal
14:41:18 21 with that. That's a mini-trial on each of these
14:41:20 22 tickers. 19 is plenty.

14:41:21 23 Thank you.

14:41:30 24 MR. FORD: Just -- I do this only because
14:41:32 25 I think it will be helpful. The 19 substantive

14:41:37 1 charges are violations of 1348. The conspiracy charge
14:41:40 2 is a violation of -- alleged violation of 1349.

14:41:44 3 If you just read that, it says right in
14:41:47 4 the indictment that the foundation of the conspiracy
14:41:50 5 are those 19 charges. That's it. It's limited to
14:41:54 6 that. That's what the grand jury indicted on. There
14:41:58 7 is no reason to discuss any stocks beyond that.

14:42:01 8 The reason this is relevant under 18
14:42:07 9 U.S.C. 371, which we all frequently operate under,
14:42:10 10 it's a generalized conspiracy statute. It permits the
14:42:13 11 government to bring charges of conspiracy based on
14:42:15 12 wrongful or unlawful conduct.

14:42:19 13 The plain text of 1349 only permits a
14:42:21 14 conspiracy when the object was a violation of 1348.
14:42:27 15 Therefore, in order to have brought it, they need to
14:42:29 16 have alleged and subsequently proven at least an
14:42:34 17 attempt or some agreement to violate that specific
14:42:38 18 statute, which is to commit securities fraud with
14:42:40 19 regard to a registered stock.

14:42:42 20 This isn't an 18 U.S.C. 13 -- 371 case.
14:42:46 21 It's an 18 U.S.C. 1349 case. They cannot back-door
14:42:51 22 this evidence in this particular context under this
14:42:54 23 statute.

14:42:59 24 THE COURT: Anybody else from the defense
14:43:01 25 want to weigh in before I ask Mr. Armstrong to...

14:43:08 1 What say the government? Why do I need
14:43:10 2 54?

14:43:10 3 MR. ARMSTRONG: Judge, like I said kind of
14:43:11 4 at the jump, we do not intend to walk through 54. We
14:43:17 5 have to have the flexibility to make these calls as we
14:43:20 6 see them as evidence comes in.

14:43:23 7 THE COURT: Why are they relevant? The
14:43:26 8 unindicted ones.

14:43:28 9 MR. ARMSTRONG: Each one that we intend to
14:43:29 10 offer does work for us. I can give Your Honor comfort
14:43:32 11 with that. I think that Mr. Ford's point was a good
14:43:34 12 one. You know, they are charged in a conspiracy. And
14:43:37 13 so they have to be partners in a crime with each
14:43:40 14 other.

14:43:40 15 And so some of these extrinsic or other
14:43:43 16 episodes that we intend to offer at trial show them
14:43:47 17 doing just that. So, for example, we have examples
14:43:50 18 where Mr. Hennessey is coordinating with
14:43:53 19 Mr. Constantinescu. They're not charged in a
14:43:55 20 substantive count with that kind of behavior, but it
14:43:57 21 does provide explicit meat to the bones that proves up
14:44:02 22 the conspiracy for why they are in fact charged
14:44:04 23 together.

14:44:05 24 So there are lots of examples like that
14:44:07 25 where they're going to argue, oh, well, you didn't see

14:44:09 1 any evidence that these two were actually doing this
14:44:11 2 together, but those other episodes prove that point
14:44:14 3 exactly.

14:44:15 4 And so, number one, they prove the
14:44:17 5 combinations. They prove that they were doing it
14:44:19 6 together. And they also prove that this was not a
14:44:23 7 mistake. It was not an accident. It proves their
14:44:27 8 fraudulent intend, which if Your Honor gets past the
14:44:29 9 point that they're not extrinsic, it certainly is
14:44:31 10 admissible under 404(b).

14:44:36 11 THE COURT: All right. I'm denying the
14:44:44 12 motion in limine on this point. But in doing so, let
14:44:53 13 me add one point. And maybe it's a point I've beat
14:44:55 14 into the ground, so I shouldn't be doing it, but I am
14:44:58 15 going to do it anyway, is that no juror is going to
14:45:03 16 sit through all this and listen to all this. I mean,
14:45:08 17 you can have 20,000 pages of exhibits. And if you
14:45:11 18 think a juror is going to sit down and read all 20,000
14:45:14 19 pages, it ain't going to happen.

14:45:16 20 And so I urge all of you to really think
14:45:23 21 about a succinct way you're going to present your case
14:45:27 22 that's, you know, does what you need to do, but keeps
14:45:31 23 the jury interested, keeps them following the
14:45:35 24 evidence.

14:45:35 25 I mentioned that trade secret case the

14:45:42 1 other day or this morning. And I gave them the same
14:45:47 2 lecture I'm giving you guys. I thought they put in
14:45:49 3 way too many exhibits. I mean, we had like 1,000
14:45:52 4 exhibits.

14:45:53 5 And I know sometimes you just feel like,
14:45:55 6 okay, I've got my summary chart, but I need to have
14:46:01 7 all the underlying stuff in to evidence so the summary
14:46:04 8 chart's good. Fine. We'll do that.

14:46:08 9 But trying to use that and trying to have
14:46:11 10 the jury follow that is crazy because they're not
14:46:14 11 going to be able to do that.

14:46:16 12 And, I mean, I have toyed with several
14:46:25 13 aspects of this. One of which was probably obvious
14:46:29 14 from where I opened this morning is that I've been
14:46:32 15 looking seriously at the charge and how the charge is
14:46:35 16 going to read.

14:46:36 17 And then the other thing is, I've looking
14:46:39 18 at this issue, thinking of the time involved in this
14:46:45 19 and what constraints I can put on the time without
14:46:48 20 impinging either side.

14:46:50 21 And I'm not convinced yet that I cannot
14:46:54 22 give each side -- all sides -- certain time
14:46:59 23 limitations. And I may very well do that.

14:47:04 24 And so while I'm not granting the motion,
14:47:13 25 because I do think there is going to be relevance to

14:47:15 1 some of that testimony, or at least could be relevant,
14:47:23 2 don't be surprised if before we start trial that I,
14:47:25 3 you know, impose on everybody some kind of trial
14:47:28 4 limit -- time limitations.

14:47:36 5 Yes, it's 19 stocks. Maybe 35 more. But
14:47:42 6 even if you buy the government's case, it's one
14:47:48 7 scheme. I mean, it's the same scheme over and over
14:47:52 8 again.

14:47:55 9 I mean, so, you know, it's only going to
14:47:57 10 take one time to educate the jury from the
14:47:59 11 government's standpoint. And it's really only going
14:48:03 12 to take one or two times, from the defense standpoint
14:48:05 13 to, you know, try to destroy the government's
14:48:15 14 education of the jury and reeducate them. And after
14:48:17 15 that, it's going to be the same thing over and over
14:48:19 16 again.

14:48:19 17 So I'm putting that in as a caution. That
14:48:25 18 even though I know you've been telling me that it's
14:48:28 19 going to last a long time since we first met, but I'm
14:48:35 20 also telling you that I haven't bought into that yet.

14:48:38 21 And especially when I have to look 160
14:48:43 22 jurors in the face and tell them how long we think
14:48:45 23 this trial is going to last. You know, we might not
14:48:48 24 be able to empanel a jury anyway.

14:48:59 25 All right. The next one, counsel, is

14:49:00 1 false statements that aren't on the list provided by
14:49:02 2 the government.

14:49:06 3 MS. CORDOVA: Your Honor, this is similar
14:49:08 4 to the last motion in the sense that these false
14:49:10 5 statements are obviously critical to the charges. And
14:49:12 6 so, therefore, each one of these defendants oftentimes
14:49:16 7 would have tweeted maybe 100 times about a stock.

14:49:21 8 And so, as Your Honor required the
14:49:23 9 government, in, I believe it was June of 2023, to
14:49:26 10 provide these false statements, we would request that
14:49:29 11 the government be limited to those alleging that those
14:49:32 12 are arguing that those were the false statements and
14:49:34 13 not be allowed to change its argument and pick other
14:49:38 14 statements and say, oh, no, these are the false
14:49:39 15 statements.

14:49:40 16 That's what we're trying to avoid here, is
14:49:42 17 they've identified the false statements, those are the
14:49:44 18 false statements, those are the key elements of the
14:49:47 19 charge of securities fraud.

14:49:49 20 And, therefore, the government should be
14:49:50 21 limited to arguing at trial that those statements that
14:49:53 22 have already been disclosed are false.

14:49:56 23 MR. ARMSTRONG: Your Honor, this is
14:49:58 24 fantastically ironic. They have moved to exclude us
14:50:02 25 from focusing the jury's attention on those specific

14:50:05 1 false statements that, in Ms. Cordova's own words, are
14:50:09 2 the foundation of the charge and foundation to
14:50:11 3 elements.

14:50:11 4 And so now, because we have taken out the
14:50:13 5 key or the legend that proves out which statements
14:50:17 6 we're going to actually be alleging to be false, the
14:50:21 7 jury, in Ms. Cordova's own words, is now left to
14:50:22 8 wander in the abyss as to which of the 100 are
14:50:26 9 actually at issue, which is why we color coded it in
14:50:29 10 first point and why we would re-urge that point
14:50:32 11 before, Your Honor.

14:50:32 12 THE COURT: Well, no. I'm not changing my
14:50:35 13 mind.

14:50:35 14 MR. ARMSTRONG: Okay.

14:50:38 15 THE COURT: But, yes, I am granting the
14:50:40 16 motion in limine on that point.

14:50:42 17 Now, having said that, if you have the
14:50:45 18 right witness, who knows what they're talking about, I
14:50:50 19 mean, you can get up there and say which of these
14:50:52 20 statements is false? Well, this one is true but this
14:50:56 21 one isn't. I mean, you clearly do that with an
14:50:58 22 appropriate witness.

14:51:00 23 MR. ARMSTRONG: Okay. Thank you, Judge.

14:51:00 24 THE COURT: I'm not permitting the
14:51:01 25 government from pointing out which statements they

14:51:04 1 think are not true.

14:51:06 2 MR. ARMSTRONG: Had to try again.

14:51:20 3 THE COURT: Okay. The next one has to do
14:51:21 4 with undisclosed co-conspirators.

14:51:25 5 MS. CORDOVA: Correct, Your Honor.

14:51:26 6 The government has repeatedly refused our
14:51:28 7 request to identify any alleged co-conspirators in
14:51:31 8 this case. And, therefore, we would request that they
14:51:34 9 not be allowed to present any alleged co-conspirator
14:51:38 10 or unidentified unalleged co-conspirators that they
14:51:45 11 then, for purposes of trial, allege to be a
14:51:47 12 co-conspirator for purposes of introducing a
14:51:50 13 statement.

14:51:51 14 But we would just request that, before
14:51:53 15 they're allowed to argue in front of a jury, present
14:51:56 16 any evidence in front of a jury, about an alleged or
14:51:59 17 newly alleged co-conspirator, that -- that a James
14:52:05 18 hearing held before that is allowed.

14:52:07 19 THE COURT: Okay. I'm granting that.

14:52:11 20 The next one is about Government
14:52:13 21 Exhibit 1, which we've already talked about it.

14:52:16 22 And then we get to audio recordings of
14:52:21 23 conversations that Mr. Hennessey was not a part of and
14:52:25 24 were not made in furtherance of the alleged
14:52:28 25 conspiracy.

14:52:28 1 MS. CORDOVA: Your Honor, this is a hefty
14:52:30 2 part of our motion. And I don't know if you want to
14:52:32 3 handle it now or when we go through the exhibits. I
14:52:35 4 think this is something that has already been
14:52:38 5 addressed somewhat in the hearing today. But I'm
14:52:42 6 happy to address the arguments now or --

14:52:44 7 THE COURT: I think both 9 and 10, the
14:52:47 8 last two, this one and the authenticity issue, we'll
14:52:50 9 take up exhibit by exhibit.

14:52:50 10 MS. CORDOVA: Yes, Your Honor.

14:52:59 11 THE COURT: Okay. Let me flip over to
14:53:01 12 Mr. -- this is Document 542, Mr. Constantinescu's
14:53:07 13 motion.

14:53:10 14 Mr. Ford, do you want to -- we haven't
14:53:25 15 done this one, have we? 542?

14:53:25 16 MR. FORD: Your Honor, we believe it would
14:53:29 17 be more efficient to address these arguments as we go
14:53:31 18 through exhibit by exhibit.

14:53:33 19 THE COURT: The exhibits? Yeah, a lot of
14:53:34 20 these, when I took a look at them, I thought this
14:53:38 21 isn't a motion in limine, this is an objection to an
14:53:39 22 exhibit. Okay.

14:53:47 23 MR. FORD: The goal was to expedite trial
14:53:48 24 so we weren't having sidebars.

14:54:00 25 THE COURT: No, and I agree with that

14:54:01 1 part.

14:54:14 2 Mr. Fleites, this is Mr. Hrvatin's motion
14:54:17 3 in limine. This is, counsel, 544. And it's actually
14:54:23 4 much shorter. Now the two exhibits you object to,
14:54:28 5 we'll take those up when we go through exhibits. But
14:54:34 6 then we have two categories, the first one being
14:54:37 7 extraneous crimes.

14:54:41 8 MR. FLEITES: Judge, if I may. Could I
14:54:45 9 ask for just a moment? I need to pull it up. I have
14:54:47 10 the wrong one.

14:54:57 11 MR. ARMSTRONG: I'm sorry, Your Honor,
14:55:01 12 what number was it?

14:55:03 13 THE COURT: It's 544. After that, I'm
14:55:04 14 going to take up Mr. Cooperman's, which is 546, so...

14:55:09 15 MR. ARMSTRONG: Thank you.

14:55:13 16 MR. FLEITES: Yes, Judge.

14:55:27 17 This pertains to Government's 233 and 234.
14:55:31 18 I think those might be better handled as well when we
14:55:35 19 go through the exhibits, Your Honor.

14:55:37 20 THE COURT: Okay. But tell me, what
14:55:38 21 extraneous crimes are we worried about Mr. Hrvatin
14:55:48 22 having committed?

14:55:49 23 MR. FLEITES: Well, Judge, a lot of these
14:55:50 24 conversations take place between the two
14:55:57 25 individuals -- there's many individuals, Judge. And

14:56:01 1 they reference different stocks, stocks that weren't
14:56:04 2 traded. And as such, they should be excluded.

14:56:07 3 But I think, Judge, I can probably shed
14:56:10 4 some light on it a little bit better when we go
14:56:12 5 through the exhibits.

14:56:13 6 THE COURT: Okay. But, I mean, we're
14:56:15 7 not -- the government is not going to trot out like a
14:56:18 8 bank robbery conviction or something that has --

14:56:21 9 MR. FLEITES: I would hope not, Judge, no,
14:56:21 10 that's not what I'm referring to.

14:56:23 11 THE COURT: That's what I mean. When I
14:56:24 12 read this, that what I'm thinking.

14:56:26 13 MR. FLEITES: No, Judge. That's not where
14:56:27 14 we're going with it.

14:56:31 15 THE COURT: Okay. All right. And what
14:56:31 16 about the Twitter messages between Mr. Constantinescu
14:56:34 17 and Mr. Hrvatin a year prior to everything?

14:56:34 18 MR. FLEITES: Yes, Judge. I think a part
14:56:34 19 of that is it's outside the scope.

14:56:42 20 THE COURT: Are those the same exhibits?

14:56:43 21 MR. FLEITES: Yes, but it's outside scope
14:56:44 22 is the gist of it, but I can get into it
14:56:47 23 further when --

14:56:47 24 THE COURT: All right. Let's do it with
14:56:49 25 the exhibits, then.

14:56:56 1 All right. Let me go to Mr. Cooperman's,
14:57:02 2 which is 546.

14:57:07 3 MS. EPLEY: Yes, Your Honor. I think the
14:57:08 4 first one has already been addressed, in regards to
14:57:11 5 motion in limine already addressed by the Court today.

14:57:14 6 And 2 and 3, as I understand it, are not
14:57:17 7 being objected to by the prosecution.

14:57:23 8 THE COURT: All right. 2 and 3 being the
14:57:24 9 divorce and immigration status?

14:57:26 10 MR. ARMSTRONG: Yes. Thank you.

14:57:28 11 THE COURT: Okay. They're granted.

14:57:29 12 MS. EPLEY: Thank you.

14:57:30 13 THE COURT: Let me backtrack. Because my
14:57:36 14 ace law clerk tells me I skipped one.

14:57:38 15 543 is another joint motion from the
14:57:43 16 defendants. The second joint motion.

14:57:49 17 MR. WILLIAMS: Your Honor, Mr. Williams
14:57:49 18 for Mr. Rybarczyk.

14:57:57 19 A number of these matters, I believe, have
14:57:58 20 already been covered, so I think we can work through
14:58:00 21 it pretty quickly.

14:58:02 22 The first category of undisclosed
14:58:04 23 statements really relates to any undisclosed
14:58:06 24 statements by any defendant, whether post-arrest,
14:58:09 25 which is A; B, any other statements that haven't been

14:58:13 1 disclosed in discovery.

14:58:15 2 The goal here is just to eliminate the
14:58:17 3 possibility of surprise. And then, again, alluding to
14:58:23 4 what others may have -- on D, hearsay statements, that
14:58:26 5 what others may have told the defendants or what have
14:58:29 6 you, I think we can pass that. I'll strike D for
14:58:34 7 right now. I think that's going to come up on an
14:58:36 8 exhibit-by-exhibit basis. It's like --

14:58:42 9 THE COURT: So let's stop with 1. 1A
14:58:42 10 through C --

14:58:47 11 MR. WILLIAMS: A and B are no surprise.
14:58:48 12 C, I think we can deal with on an
14:58:50 13 exhibit-by-exhibit basis, because it deals with
14:58:52 14 authenticity. The same as D.

14:58:54 15 But A and B are just no oral or other
14:58:56 16 statements by defendant that haven't previously been
14:58:59 17 produced in discovery.

14:59:00 18 THE COURT: All right. I'm granting that.
14:59:02 19 MR. WILLIAMS: Category 2 is on extraneous
14:59:05 20 offenses or other bad acts. I believe Tommy
14:59:07 21 Cooperman's counsel addressed what I think is covered
14:59:10 22 by A and B. Some other arrest, some other crime, no
14:59:14 23 bank robbery, no allegations of whatever that is,
14:59:16 24 other than that's what in the indictment.

14:59:16 25 C, we've covered previously today, so we

14:59:23 1 can pass that.

14:59:29 2 D, I think again is, you know, covered by
14:59:30 3 Cooperman.

14:59:30 4 And then E we have not touched on. And
14:59:33 5 that is the -- that the defendants have been sued by
14:59:35 6 the SEC civilly. We don't think that's relevant to
14:59:38 7 this trial.

14:59:40 8 THE COURT: Okay. I'm granting that.

14:59:45 9 MR. WILLIAMS: Okay. If you're ready to
14:59:46 10 move on to Category 3, I can -- the simplest way to
14:59:47 11 describe that is that the government has designated
14:59:54 12 two experts, which you've heard a lot about today,
14:59:56 13 Dr. Garibotti and Mr. Peter Melley.

14:59:58 14 What we're concerned about and what this
15:00:00 15 portion of the motion attempts to address is concerns
15:00:03 16 about back-door expert testimony from lay individuals
15:00:07 17 about, for example, you know, Special Agent Hale, who
15:00:11 18 was intimately involved in the investigation of this
15:00:13 19 case and may be a witness for the government attempts
15:00:17 20 to testify as an undesignated expert about securities
15:00:20 21 fraud investigations based on his training and
15:00:22 22 experience, what the defendants knew or should have
15:00:27 23 known or ought to have known, or characteristics of
15:00:29 24 how day traders or markets act, operate, or behave.

15:00:32 25 If that's properly the subject of an

15:00:34 1 expert designation, as we've seen with the FINRA
15:00:36 2 employee Mr. Melley, we don't think that that an agent
15:00:40 3 or a layperson should be able to testify about how day
15:00:44 4 traders or markets, operate or behave.

15:00:47 5 They can testify how they behaved as a day
15:00:49 6 trader, because that's just what they did. But not as
15:00:52 7 generally what -- how day traders behave or how the
15:00:56 8 markets operate.

15:01:00 9 Again, and then the speculation --
15:01:01 10 speculative of what defendants knew or should have
15:01:03 11 known would be just be speculative in addition to
15:01:05 12 being improper.

15:01:05 13 THE COURT: Okay. I'm granting that in
15:01:07 14 general for, number one, undisclosed experts.

15:01:11 15 MR. WILLIAMS: Okay.

15:01:12 16 THE COURT: And, secondly, for disclosed
15:01:15 17 experts, I'm granting it as to things outside their
15:01:21 18 report and disclosed expertise. Obviously that goes
15:01:25 19 both ways.

15:01:26 20 MR. WILLIAMS: One area that I believe I
15:01:28 21 should bring highlight is subject 3(d) on page 3. And
15:01:32 22 this is about social media.

15:01:33 23 This is a social media case. And
15:01:36 24 causation has been talked about. But this issue
15:01:40 25 specifically is an area of particular concern because

15:01:44 1 Your Honor and the jury are going to hear evidence of
15:01:46 2 the number of social media followers each defendant
15:01:48 3 has.

15:01:50 4 There is no expert testimony, there is
15:01:52 5 going to be no evidence of the impact that any tweet
15:01:56 6 had -- in other words, just because someone has
15:01:59 7 300,000 Twitter followers doesn't mean they all saw a
15:02:02 8 particular post. It doesn't even mean they're all
15:02:04 9 real people or that they liked it or that they took
15:02:06 10 action on it or that the action they took on it was
15:02:08 11 stock trading or that, if they did trade, that they
15:02:12 12 traded in accordance with the defendants' supposed
15:02:17 13 recommendations -- in accordance with the defendants'
15:02:18 14 alleged recommendations.

15:02:19 15 In other words, you can't say who was
15:02:21 16 watching it, what they thought about it and what they
15:02:23 17 did about it. Let alone -- and so that 300,000
15:02:29 18 followers could ultimately mean zero did what any of
15:02:33 19 these people supposedly recommended. It could be
15:02:36 20 five, it could be 50,000.

15:02:38 21 But there's no evidence and there's no
15:02:40 22 expert testimony of the actual impact. And instead
15:02:44 23 what we're going to have is this implied theory that
15:02:47 24 because they have a lot of social media followers
15:02:51 25 therefore, some subset, some large subset took action

15:02:54 1 based on it.

15:02:55 2 We will hear individuals, I anticipate, as
15:02:59 3 government witnesses who may I saw it and I followed
15:03:02 4 it. And we've had discussions about that. Your Honor
15:03:04 5 may choose to admit that. But speculation about what
15:03:07 6 the other 299,999 did is inappropriate.

15:03:14 7 And that would probably be the subject of
15:03:15 8 expert testimony and we don't have that designated or
15:03:18 9 the backup data.

15:03:19 10 THE COURT: Okay. To the extent that I've
15:03:21 11 already ruled, I'm including that in my ruling.

15:03:24 12 MR. WILLIAMS: Thank you.

15:03:28 13 I'm going to pass on F.

15:03:34 14 Finally on 5, on improper requests and
15:03:39 15 comments, these are just general trial things without
15:03:41 16 reference to specific pieces of evidence; is that, you
15:03:46 17 know, a defendant -- and this could work both ways,
15:03:48 18 Your Honor, that we be requested in the presence of
15:03:50 19 the jury to stipulate to the existence or nonexistence
15:03:52 20 of something. That's a discussion to be had outside
15:03:55 21 of the jury's presence.

15:03:57 22 And sometimes that's helpful and we've
15:03:59 23 engaged in those discussions, but they shouldn't
15:04:01 24 happen in front of the jury.

15:04:02 25 THE COURT: No, I agree with that. And

15:04:03 1 I'm granting 5 on all the subparts. But obviously
15:04:07 2 what's good for the goose is good for the gander.

15:04:10 3 MR. WILLIAMS: Absolutely.

15:04:11 4 THE COURT: You know, you guys can't do
15:04:12 5 that to the government either.

15:04:14 6 MR. WILLIAMS: My hypocrisy doesn't go
15:04:17 7 that far.

15:04:18 8 Hypothetical questions, Your Honor, this
15:04:19 9 gets into the, well, what would you expect they do.
15:04:23 10 We do you think is appropriate.

15:04:24 11 We don't think hypotheticals from
15:04:24 12 witnesses are appropriate. They're speculative and
15:04:28 13 they're not admissible. And so we'd rather just cut
15:04:28 14 down on that.

15:04:33 15 THE COURT: Well, I'll grant that as to
15:04:35 16 fact witnesses.

15:04:36 17 MR. WILLIAMS: Finally, on 7 -- and to
15:04:38 18 make this clear, we don't want hearsay from the event
15:04:44 19 that someone testifies and says, well, Tommy Cooperman
15:04:47 20 and Edward Constantinescu, you know, they're drinking
15:04:49 21 buddies or they're buddies or whatever that is.

15:04:51 22 Now, there may be exhibits, such as
15:04:53 23 Government Exhibit 1, where there may be some
15:04:55 24 photographic or other evidence of that, the existence
15:04:57 25 of communications between two or more co-defendants.

15:05:00 1 But speculative hearsay from a fact
15:05:03 2 witness or what have you is inappropriate unless they
15:05:07 3 have personal knowledge of the existence or the extent
15:05:10 4 of a relationship between two or more defendants or
15:05:12 5 unindicted co-conspirators, et cetera.

15:05:14 6 THE COURT: I'll grant that.

15:05:16 7 MR. WILLIAMS: Thank you.

15:05:17 8 That's all I have for this motion, Your
15:05:17 9 Honor.

15:05:18 10 MS. EPLEY: Is it worth telling Your Honor
15:05:30 11 they're not really drinking buddies, so that doesn't
15:05:30 12 stick in your head?

15:05:30 13 THE COURT: I don't hold that against
15:05:32 14 people.

15:05:41 15 MR. ARMSTRONG: Your Honor, just some
15:05:41 16 points of clarification, because you were going pretty
15:05:41 17 fast. I want to make sure that we understand what's
15:05:44 18 actually going on.

15:05:46 19 So on page 3, the undesignated expert
15:05:49 20 testimony. You know, we don't anticipate having Agent
15:05:53 21 Hail, you know, talk generally about his experience in
15:05:57 22 the markets or anything like that, so we're on all
15:06:00 23 fours with Your Honor on that.

15:06:01 24 But he is -- I think it is fair game for
15:06:03 25 him to be able to interpret terms and explain terms to

15:06:06 1 the jury based upon his personal experience in this
15:06:09 2 case. So I just want to make sure that we're on the
15:06:11 3 same page with Your Honor about that.

15:06:12 4 THE COURT: Well, if it's something
15:06:14 5 he's -- did or did to investigate the case, I think he
15:06:16 6 can do that.

15:06:17 7 MR. ARMSTRONG: I just want to make sure.

15:06:19 8 THE COURT: But if it's some kind of
15:06:20 9 technical term that actually get into an expert realm
15:06:24 10 and he's not designated as an expert, he can't do
15:06:27 11 that.

15:06:28 12 MR. ARMSTRONG: Okay. On D, testimony of
15:06:30 13 the impact of social media posts. Kind of in the same
15:06:34 14 vein. We do plan to elicit testimony from the
15:06:38 15 co-conspirators, the defendants' partners in crime.

15:06:41 16 And they're going to give lay opinion
15:06:42 17 testimony that's rationally based on their own
15:06:44 18 perceptions as to what they perceived to be happening
15:06:48 19 in realtime.

15:06:49 20 So, for example, when they perceive the
15:06:51 21 tweet to be coming out, they themselves believed that
15:06:54 22 it had this impact and they could see it. And they,
15:06:56 23 in fact, traded for that reason around it. So we're
15:07:03 24 not going to coach that as expert. I'm not going to
15:07:03 25 be offering it as expert.

15:07:04 1 I just want to make sure we're on the same
15:07:05 2 page about how we plan to offer some parts of this
15:07:07 3 kind of testimony.

15:07:08 4 THE COURT: Well, I think they can testify
15:07:09 5 as to how they perceived it.

15:07:09 6 MR. ARMSTRONG: Exactly.

15:07:14 7 THE COURT: And if they were involved in,
15:07:16 8 you know, the social media tweets or whatever, they
15:07:24 9 can say here's why I did it.

15:07:25 10 But I think Mr. Williams' point was, you
15:07:27 11 know, they can't get up and say, well, you know,
15:07:28 12 10,000 people saw this because they don't know that.
15:07:31 13 There's no way they could know that. I mean, unless
15:07:34 14 they have some proof that I don't think they have.

15:07:37 15 MR. ARMSTRONG: No. We're not going to
15:07:38 16 get into that degree of specificity.

15:07:41 17 THE COURT: But, I mean, they can testify
15:07:45 18 as to their role and what they knew from personal
15:07:48 19 knowledge. But I'm not going to let them speculate
15:07:50 20 beyond that.

15:07:52 21 MR. ARMSTRONG: Understood.

15:07:53 22 Hypothetical questions. Hypothetical
15:07:56 23 questions, number 6 on page 4. I think it is fair
15:07:59 24 game to offer hypothetical questions to the victim
15:08:03 25 witnesses.

15:08:03 1 So, for example, would it have been
15:08:05 2 important for you to know that defendant insert
15:08:08 3 whoever was selling at the same time he was --

15:08:11 4 THE COURT: I'm not exactly sure that's
15:08:13 5 hypothetical. But, I mean, that I think you can ask.

15:08:16 6 MR. ARMSTRONG: Okay. And then number 7,
15:08:21 7 just to make sure we're on the same page. It was
15:08:23 8 unclear as to the scope. I think we're going to have,
15:08:26 9 again, co-conspirators testify that all the defendants
15:08:29 10 generally were friends. And so they can talk about
15:08:31 11 that through the lens of their own personal
15:08:34 12 observations.

15:08:34 13 THE COURT: Through their own personal
15:08:37 14 knowledge they can talk about it, but don't -- you
15:08:40 15 know, Bob told me that Harry and Joe used to drink
15:08:43 16 together is out.

15:08:44 17 MR. ARMSTRONG: Agreed. Thank you, Judge.

15:09:00 18 THE COURT: I think that gets me to 547,
15:09:02 19 which is Mr. Matlock's individual motion in limine.

15:09:16 20 MR. REYES: Your Honor, I believe it was
15:09:19 21 545. I don't know if we -- we're going to defer that
15:09:21 22 to the exhibits anyway, 545, but it was about --

15:09:22 23 THE COURT: Hold on. Let me see. I'm
15:09:42 24 going via my notebook. And 545 is in a different
15:09:45 25 notebook.

15:09:46 1 MR. REYES: No problem, Your Honor. We
15:09:47 2 were -- that's about Exhibit 7 of the government's
15:09:50 3 proposed exhibits. And so we were going to defer that
15:09:52 4 anyway.

15:09:53 5 THE COURT: Okay.

15:09:54 6 MR. REYES: 547 is about irrelevant
15:09:59 7 statements. We consider irrelevant statements made by
15:10:03 8 Mr. Matlock. Best way I'd like to describe this, Your
15:10:10 9 Honor, is starting with the superseding indictment.
15:10:12 10 In the superseding indictment, the -- I think on the
15:10:14 11 first page, the government lays out a scheme. And the
15:10:16 12 scheme is that the defendants allegedly bought, they
15:10:19 13 then allegedly said pumping statements -- or said
15:10:23 14 something. And then sold.

15:10:26 15 The statements I'm referring to in this
15:10:28 16 motion in limine were not made at any time by
15:10:32 17 Mr. Matlock between the time he bought and sold his
15:10:37 18 position, the vast majority of his position.

15:10:39 19 And so we consider the statements, after
15:10:43 20 he had already sold his position, to be outside the
15:10:47 21 scheme, outside the superseding indictment and the
15:10:49 22 scope of it. Not only did he have no position, but
15:10:54 23 neither did any of the co-defendants or alleged
15:10:56 24 co-conspirators.

15:11:00 25 So, ultimately, the statements made after

15:11:02 1 he sold, in our opinion, are not relevant. They're
15:11:05 2 not in furtherance of a crime. And he can have no
15:11:10 3 intent to deprive, as *Ciminelli* requires deprived
15:11:22 4 property -- can have no intent to deprive property or
15:11:25 5 gain any benefit from making these statements if he's
15:11:27 6 not longer in the stock.

15:11:29 7 One way to put it, Your Honor, is you
15:11:30 8 can't rob the bank if you've already left the bank.
15:11:33 9 And so we consider these -- we'd ask that these
15:11:36 10 statements outside the scope be excluded.

15:11:42 11 THE COURT: I'm looking at the first page
15:11:43 12 of 547. Is that one of them?

15:11:49 13 MR. REYES: Yes, sir. That is one of
15:11:50 14 them. So that statement occurs after -- and this is
15:11:54 15 according to the government's own evidence, even in
15:11:58 16 the Garibotti report, after the defendant has sold all
15:12:02 17 but -- to be clear, and for the record he does have
15:12:04 18 six shares left, which he then sold.

15:12:09 19 But, again, Your Honor outside the scope.
15:12:10 20 He cannot in any way gain any benefit from allegedly
15:12:16 21 moving the market here, nor could any of the
15:12:18 22 co-conspirators.

15:12:19 23 At that time, no one had any stock.
15:12:22 24 Whether or not or what's said in this statement, even
15:12:25 25 though he is admonishing folks and he is telling

15:12:28 1 people to trade their own plan, but has no relevance
15:12:32 2 as to any kind of probative value as to the
15:12:34 3 furtherance of a conspiracy.

15:12:37 4 For those reasons, we move to exclude
15:12:39 5 these statements, Your Honor.

15:12:42 6 THE COURT: Mr. Armstrong?

15:12:44 7 MR. ARMSTRONG: Your Honor, this one is
15:12:45 8 kind of funny. I've got to chuckle.

15:12:47 9 Ms. Kim, can you please pull up
15:12:50 10 Government's Exhibit 4B at page 38. Ms. Kim, if you
15:13:08 11 could, please, blow up line 404 through 412, please.

15:13:17 12 And so, Your Honor, line 409 is the
15:13:18 13 operative false statement that Mr. Reyes is talking
15:13:22 14 about.

15:13:22 15 And Mr. Matlock is saying: CBAT, if you
15:13:28 16 want my plan, I will hold and down to the \$8 area --
15:13:33 17 literally in the midst of selling out his entire
15:13:36 18 position.

15:13:36 19 He says: I'm willing to take that risk.
15:13:38 20 Again, a false statement, because he's not willing to
15:13:41 21 take that risk.

15:13:42 22 I have \$2.1 million in it now. Again,
15:13:44 23 false statement because he's not in it. He doesn't
15:13:47 24 have \$2.1 million in it.

15:13:51 25 And I want 12 to 15. Again, he's

15:13:54 1 basically sold out.

15:13:54 2 And so this is literally five or six false
15:13:58 3 statements just in one Twitter post. And it shows the
15:14:02 4 cover up and it shows the scheme in action.

15:14:03 5 THE COURT: I think it's timing that
15:14:05 6 counsel is complaining about.

15:14:07 7 MR. REYES: That's right, Your Honor.

15:14:09 8 MR. ARMSTRONG: Yes, Your Honor. It's
15:14:10 9 part of the cover up.

15:14:13 10 What do you need?

15:14:16 11 THE COURT: I was looking for my
15:14:18 12 indictment, my copy of the indictment. It's wandered
15:14:25 13 away. There we go.

15:14:26 14 Go ahead.

15:14:26 15 MR. ARMSTRONG: Yes. So the timing,
15:14:29 16 actually, is absolutely critical. Because it's part
15:14:30 17 of the cover up. He's giving all of his followers
15:14:32 18 confidence that he's still in the play. And that the
15:14:35 19 play still has legs, when he obviously does not
15:14:38 20 believe that himself.

15:14:39 21 And so it's part of the cover up to
15:14:41 22 suggest to followers, hey, I'm in this with you guys,
15:14:44 23 you know, we're all in this together, we're a family
15:14:47 24 trading together, when the facts just belie any
15:14:50 25 suggestion that that is actually true.

15:14:52 1 MR. REYES: Your Honor, to what end? I
15:14:54 2 mean, this goes back to the second part of the
15:14:56 3 analysis that we were talking about earlier this
15:14:58 4 morning. He can gain nothing from this. There is no
15:15:02 5 deprivation to be gained from this. He has zero
15:15:06 6 interest at that point or benefit for making the stock
15:15:10 7 go up.

15:15:10 8 Whether he was accurate or not -- and, by
15:15:12 9 the way, he had within the hours paid \$2 million into
15:15:15 10 this stock. And that's also shown on Garibotti's own
15:15:19 11 reports.

15:15:21 12 It's irrelevant. It's after he's out. I
15:15:24 13 mean, what if he made the statement ten minutes later
15:15:26 14 or an hour later? He's out of the stock. He can't
15:15:29 15 gain anything from it.

15:15:32 16 THE COURT: Well, doesn't he -- I mean,
15:15:34 17 doesn't he still sell some stock after he makes the
15:15:37 18 statement?

15:15:37 19 MR. FORD: No, Your Honor. This was why I
15:15:39 20 spent so much time with the Court on this
15:15:41 21 presentation. This is not a cross issue.

15:15:43 22 Mr. Matlock, who made millions of dollars as a
15:15:47 23 successful stock trader, did not trade one or two
15:15:50 24 shares. He entered a large order, which was then
15:15:52 25 filled. By breaking up the fill, it allows the

15:15:55 1 government to insert this statement as if it's
15:15:58 2 occurring when he's taking actions on either side of
15:16:01 3 the statement, when he is most certainly not doing
15:16:03 4 that and I --

15:16:03 5 THE COURT: Well, what about the alleged
15:16:07 6 falsehood of the statement that I will hold? He's not
15:16:12 7 holding, he's selling. He's sold out, according to
15:16:15 8 you.

15:16:15 9 MR. FORD: I don't know what he's done
15:16:17 10 because I have to look at his actual trade records
15:16:19 11 that show when this action occurred as to where it was
15:16:23 12 filled. But If you look -- if they blow up right
15:16:25 13 underneath, Mr. Matlock buys immediately afterwards.

15:16:30 14 MR. REYES: And, Your Honor, I mean, he
15:16:30 15 actually bought back \$250,000. The idea that --
15:16:35 16 within the next day.

15:16:37 17 The idea that, again, what he says at one
15:16:42 18 moment -- it's surrounding by these sell blocks
15:16:46 19 created by the government is not exactly reflective of
15:16:49 20 when he actually sold.

15:16:50 21 To Mr. Ford's point, he was out of the
15:16:53 22 stock. I mean, it got filled -- by the way, it was
15:16:56 23 six shares that was left. But it got filled and he
15:17:00 24 was out.

15:17:01 25 But, again, he has zero, zero -- there is

15:17:05 1 absolutely no intent to deprive anyone by making these
15:17:08 2 statements. And they're outside of the time of the
15:17:10 3 stock that he was in it.

15:17:12 4 In terms of the confidence of the
15:17:13 5 statements, it's right there. He bought it back again
15:17:17 6 the next day.

15:17:17 7 And, you know, whether he changes his mind
15:17:20 8 on what he was saying or whether he was not totally
15:17:22 9 accurate, still, absolutely outside the scope of the
15:17:26 10 scheme. This is what would be called a dump, then a
15:17:31 11 pump, which I didn't find any cases -- this is the old
15:17:36 12 dump and pump.

15:17:37 13 And I don't know that I've ever seen any
15:17:40 14 case go forward on those kinds of facts.

15:17:45 15 MR. ARMSTRONG: Your Honor, we're going to
15:17:46 16 have testimony from partners in crime who are going to
15:17:48 17 talk about the importance of these kinds of tweets and
15:17:51 18 how they gave investors and other followers confidence
15:17:55 19 in the plays and projecting the air of we're all in it
15:17:59 20 together.

15:18:00 21 There's no requirement that every single
15:18:01 22 statement have to deprive someone of their money. But
15:18:04 23 this is obviously part of the scheme that we charged.
15:18:07 24 We even alleged cover-up statements like this in the
15:18:11 25 indictment.

15:18:11 1 THE COURT: Okay. I'm denying the motion
15:18:12 2 in limine on this.

15:18:14 3 MR. REYES: Thank you, Your Honor.

15:18:24 4 THE COURT: I think we have one more of
15:18:25 5 your client's. And this is more of a general one.

15:18:30 6 MR. REYES: Your Honor, I'd like to
15:18:31 7 introduce the Court to my colleague, Alex Brown, who
15:18:34 8 also represents Mr. Matlock. He's going to cover this
15:18:39 9 next one.

15:18:41 10 MR. BROWN: Good afternoon, Your Honor.

15:18:55 11 This motion in limine is, as you
15:18:57 12 mentioned, sort of a general motion in limine, that
15:19:00 13 covers -- and do you have it?

15:19:03 14 THE COURT: I have it right in front of
15:19:05 15 me.

15:19:06 16 MR. BROWN: Okay, great.

15:19:07 17 It covers, you know, the usual prior
15:19:10 18 criminal history, prior civil suit that I believe was
15:19:13 19 actioned in this court.

15:19:14 20 And then we also have two in here,
15:19:18 21 testimony exclusively through witnesses. And
15:19:21 22 Government's Exhibits Number 4 there, requesting
15:19:26 23 counsel be prohibited from commenting on government
15:19:29 24 exhibits that haven't been previously supplied.

15:19:32 25 Now, that's a little bit less relevant in

15:19:34 1 a case like this, where we're going through all of
15:19:37 2 these exhibits beforehand. But that's really just an
15:19:44 3 opening statement, making sure that we have what's
15:19:46 4 going to be shown during their opening statement, if
15:19:48 5 anything. And then restricting counsel -- back to
15:19:54 6 Number 2, from alluding to facts or exhibits which
15:19:57 7 could only come through sworn testimony without those
15:20:02 8 people testifying beforehand.

15:20:05 9 So I don't think much of this is at issue.
15:20:07 10 Some of it's already been covered today.

15:20:11 11 THE COURT: Does the government object --
15:20:13 12 this is Document 548 -- to any of these?

15:20:16 13 MR. ARMSTRONG: I don't believe so, Your
15:20:17 14 Honor.

15:20:17 15 THE COURT: All right. I'm granting all
15:20:20 16 four of them.

15:20:21 17 MR. BROWN: Thank you, Your Honor.

15:20:31 18 MR. ARMSTRONG: Your Honor, the only
15:20:32 19 caveat to that, I'm not really sure what Number 2 even
15:20:34 20 means.

15:20:35 21 THE COURT: Well, I was looking at that as
15:20:36 22 well.

15:20:40 23 Mr. Brown?

15:20:40 24 MR. BROWN: Yes, Your Honor.

15:20:43 25 THE COURT: Restricting counsel from

15:20:44 1 alluding to facts or figures or exhibits which could
15:20:47 2 only come from fact finders' attention to the sworn
15:20:52 3 testimony.

15:20:54 4 MR. BROWN: Just restricting counsel from
15:20:55 5 talking about exhibits that haven't been previously
15:20:58 6 admitted or shown to the jury.

15:20:59 7 THE COURT: All right. That I'll grant.

15:21:01 8 Okay. But I think which could only come through sworn
15:21:05 9 testimony is exactly what he's supposed to be talking
15:21:07 10 about.

15:21:12 11 Mr. Reyes, was there something else?

15:21:14 12 MR. REYES: If we were moving to 549, I
15:21:18 13 was just going to advise that we can take that up with
15:21:19 14 the exhibits as well.

15:21:22 15 THE COURT: 549?

15:21:23 16 MR. REYES: 549.

15:21:23 17 THE COURT: All right.

15:21:23 18 MR. REYES: It's about Exhibit 70 of the
15:21:25 19 government's. And we can do that then.

15:21:29 20 THE COURT: So let me go back, though.
15:21:30 21 I'm still -- I don't think we've --

15:21:37 22 MR. REYES: I was just going on the
15:21:37 23 presumption. The last one was 548.

15:21:41 24 THE COURT: Yeah, but unfortunately -- I'm
15:21:41 25 trying to reach back and pick some up.

15:21:45 1 MR. REYES: Yes, Your Honor.

15:23:42 2 THE COURT: Let me shift gears and go to

15:23:44 3 551, which is the government's motion to exclude

15:23:48 4 expert testimony. Because I think the rest of the

15:23:56 5 defendants that have outstanding ones that we haven't

15:23:59 6 ruled on are very exhibit specific.

15:24:10 7 MR. LIOLOS: Thank you, Judge.

15:24:12 8 We can walk through the specific

15:24:18 9 disclosures line by line if you want to. But there is

15:24:22 10 some sort of broad brush points, arguments that repeat

15:24:28 11 throughout that we think are not appropriate

15:24:31 12 testimony, particularly in light of several of the

15:24:35 13 general motions in limine that we filed and a lot of

15:24:38 14 the topics that we've discussed today.

15:24:40 15 One example would be a bunch of expert

15:24:44 16 testimony about irrelevant securities regulations that

15:24:48 17 apply to other types of investors or brokers or things

15:24:53 18 that aren't at issue in this case that permeates a lot

15:24:57 19 of the expert disclosures. I don't think it's

15:24:59 20 relevant to anything. I don't know why they'd be

15:25:00 21 testifying about it.

15:25:01 22 Another topic are testifying that

15:25:06 23 something is an opinion that the defendants hold.

15:25:11 24 They don't have a basis to testify to what the

15:25:14 25 defendants' opinions are. That's back-dooring in

15:25:17 1 their state of mind. That's hearsay. The only way
15:25:19 2 they can know if it's their opinion is talking to the
15:25:21 3 defendant. So it's trying to have an end-run around
15:25:24 4 the defendant testifying and putting it in the guise
15:25:28 5 of expert testimony.

15:25:29 6 For them to testify that something is a
15:25:31 7 defendant's opinion is an impermissible conclusion
15:25:34 8 that has no foundation that's the province of a proper
15:25:42 9 expert.

15:25:43 10 Another topic that's brought up throughout
15:25:45 11 their disclosures are defining something like day
15:25:46 12 trading, then looking at the defendants' activity and
15:25:52 13 saying what the defendants did was day trading.
15:25:54 14 That's trying to back-door in impermissible legal
15:25:58 15 conclusions under 704.

15:26:00 16 THE COURT: Explain that to me.

15:26:01 17 MR. LIOLOS: So saying day trading is
15:26:03 18 perfectly legal, it goes like this, up, down, and the
15:26:06 19 other day. Look at the defendant trading up, down,
15:26:07 20 and the other way here.

15:26:08 21 What they're doing is day trading.
15:26:10 22 They're just subbing in "legal" for "day trading."
15:26:14 23 It's 704 conclusion, saying the defendants' activity
15:26:17 24 here is legal, because it's what I've defined as day
15:26:20 25 trading.

15:26:26 1 THE COURT: Well, day trading is legal.
15:26:26 2 MR. LIOLOS: Isn't -- sorry, isn't legal?
15:26:26 3 THE COURT: Pardon me?
15:26:26 4 MR. LIOLOS: I misheard, Your Honor. Did
15:26:26 5 you say --

15:26:29 6 THE COURT: The government's position is
15:26:31 7 day trading is not legal?

15:26:32 8 MR. LIOLOS: No, that's not our position
15:26:34 9 at all. We.

15:26:35 10 Can look through the specific examples. I
15:26:39 11 mean, they purport to define day trading as a legal
15:26:44 12 activity, say it's X, Y, and Z.

15:26:45 13 And say the defendants are doing X, Y, and
15:26:47 14 Z. It matches up perfectly with something I've said
15:26:49 15 is legal. It's legal, right. It's a 704 ultimate
15:26:56 16 issue opinion that shouldn't come in under an expert
15:26:58 17 in a criminal case.

15:27:04 18 We can look at specific examples of this.
15:27:07 19 I'm just trying to lay out the ground rules here.

15:27:10 20 There is another pervasive topic
15:27:12 21 throughout these that we've touched on earlier, which
15:27:13 22 is the type of victim blaming that the defense has
15:27:19 23 been keen to inject in this case throughout, such as,
15:27:21 24 oh, someone should have sold here. They would have
15:27:24 25 made money. Someone should have done this. They

15:27:27 1 should have managed their trading better.

15:27:30 2 It's the type of stuff that is squarely
15:27:32 3 not relevant under the pattern instruction on
15:27:35 4 materiality in terms of the victim's negligence not
15:27:38 5 being a defense. That's persuasive throughout these
15:27:42 6 expert reports as well.

15:27:44 7 And there's also a pervasive effort
15:27:47 8 through these report to admit a bunch of hearsay in
15:27:50 9 terms of the general consensus of the market was, or
15:27:54 10 people were saying this, that, and the other thing and
15:27:57 11 it was proof of the underlying events. That sort of
15:28:02 12 testimony is not appropriate.

15:28:05 13 If it's helpful to the Court, we can walk
15:28:07 14 through one by one.

15:28:08 15 THE COURT: I think it would be helpful.
15:28:11 16 Because --

15:28:13 17 MR. LIOLOS: Certainly. So we can start
15:28:14 18 with Aaron Hughes.

15:28:14 19 THE COURT: Okay.

15:28:14 20 MR. LIOLOS: Which I think was
15:28:21 21 Exhibit 1 -- I don't know if you have our filing in
15:28:22 22 front of you.

15:28:22 23 THE COURT: I have it right in front of
15:28:22 24 me.

15:28:24 25 MR. LIOLOS: First of all, Mr. Hughes, it

15:28:28 1 said in the disclosure that his curriculum vitae was
15:28:30 2 attached to the report. It wasn't. I don't know who
15:28:33 3 Mr. Hughes is. We don't have any information about
15:28:35 4 his background, other than what's in the face of the
15:28:37 5 report. We don't have his CV.

15:28:40 6 It says that he's been engaged --

15:28:43 7 THE COURT: Could we get them a copy of
15:28:47 8 the CV right away?

15:28:47 9 MR. LEWIS: We shall, Your Honor. That's
15:28:47 10 an oversight. I apologize.

15:28:54 11 Chip Lewis for Mr. Cooperman.

15:28:54 12 MR. FERTITTA: Zachary Fertitta for
15:28:54 13 Mr. Deel.

15:29:04 14 I will get him a copy of the CV. It is
15:29:05 15 attached to Filing 504. It was filed on 9/6/23.

15:29:05 16 THE COURT: All right.

15:29:11 17 MR. LEWIS: Your Honor, I promise we'll
15:29:12 18 get it to him.

15:29:12 19 THE COURT: All right.

15:29:14 20 MR. LEWIS: But I'll get you a copy.

15:29:17 21 MR. LIOLOS: Okay. It wasn't attached to
15:29:18 22 the report that you sent me.

15:29:18 23 It also says that he had been engaged in
15:29:21 24 many cases litigated before various Courts as a
15:29:24 25 consulting expert, as well as a testifying expert.

15:29:26 1 The report itself discloses none of those cases.

15:29:29 2 Does the filing have that list?

15:29:31 3 MR. FERTITTA: It does provided a number
15:29:33 4 of cases. And I apologize and I'll get it to you.

15:29:35 5 MR. LIOLOS: Appreciate it.

15:29:36 6 It states that he's qualified in, quote,
15:29:39 7 the field of data forensics. I don't know exactly
15:29:45 8 what that is, I haven't looked at his CV, obviously,
15:29:47 9 but then he goes on to purport to testify to a number
15:29:54 10 of stockmarket terms, trading activity. I don't
15:30:00 11 understand how the field of data forensics qualifies
15:30:02 12 someone as a stock market trader. The report itself
15:30:09 13 doesn't link those two up. I don't think there's a
15:30:11 14 sufficient basis in what I've seen disclosed. Maybe
15:30:13 15 there's something --

15:30:13 16 THE COURT: Well, I mean, there's no way I
15:30:14 17 can rule on that just based on what you're telling me
15:30:18 18 or what I'm reading.

15:30:19 19 MR. LIOLOS: I would agree with you. The
15:30:21 20 point of it --

15:30:22 21 THE COURT: Let's assume for motion in
15:30:26 22 limines that we're working on today that he's
15:30:28 23 qualified to opine on what he purports to opine to.

15:30:32 24 MR. LIOLOS: Okay. So, again, there's --
15:30:39 25 if he's qualified to do that, I mean, there's a number

15:30:42 1 of definitions that he would take up in terms of swing
15:30:45 2 trading and the type of stuff that Mr. Melley is
15:30:48 3 talking about. I mean, you know, I question whether
15:30:52 4 he's as qualified as Mr. Melley, but we'll put that
15:30:54 5 aside for today.

15:30:55 6 References to, you know, others' activity
15:31:00 7 on the internet or the stockmarket. This goes back to
15:31:03 8 what we were talking about earlier in terms of other
15:31:05 9 good or bad conduct. There's a lot of points in his
15:31:09 10 disclosure that talk about, you know, based on recent
15:31:12 11 news regarding a TRCH merger. There was plenty of
15:31:17 12 speculation that TRCH would rise. I mean, that talks
15:31:19 13 about hearsay.

15:31:20 14 He's quoting from news articles saying the
15:31:23 15 general consensus was, and then offering quotes from
15:31:26 16 news articles. I mean, there's no foundation that any
15:31:30 17 of this stuff is tethered to what we're talking about
15:31:33 18 here.

15:31:39 19 And I think this line that Your Honor was
15:31:39 20 drawing earlier is really helpful. And this is sort
15:31:40 21 of where it comes to the rub. To the extent that a
15:31:42 22 defendant was talking about in the post, hey, oil is
15:31:46 23 going up, this is great, buy the stock. He can
15:31:49 24 testify about the circumstances surrounding that.

15:31:53 25 But to have experts sit up there day after

15:31:55 1 day and just talk about what was floating around on
15:31:58 2 the internet, untethered from any of the defendants
15:32:00 3 and their state of mind, is sort of a bridge too far
15:32:03 4 and I think is 403 all day long the further we get
15:32:08 5 down this road.

15:32:16 6 You know, the third topic in here is
15:32:16 7 testimony about -- as to what defendants' opinions,
15:32:24 8 their knowledge or their mental states were. So one
15:32:28 9 of the opinions --

15:32:28 10 THE COURT: I'm granting that.

15:32:28 11 MR. LIOLOS: Okay.

15:32:35 12 THE COURT: What their mental states were,
15:32:38 13 unless he's got more psychiatric background than I
15:32:41 14 think he does, I'm not going to let him opine on their
15:32:44 15 mental state or on whether something is an opinion or
15:32:47 16 not.

15:32:48 17 MR. LIOLOS: And, yes. Thank you, Your
15:32:50 18 Honor. This is connected to the news point, right.

15:32:53 19 One of the disclosures is, Mr. Matlock is
15:32:56 20 stating his opinion based on the fact that Westwater
15:33:01 21 Resources is a complementary company that mines and
15:33:02 22 purifies graphite materials and whatnot.

15:33:06 23 You know, first of all, the opinion --
15:33:06 24 according to Your Honor's ruling right now shouldn't
15:33:09 25 come in, but to the extent that a defendant hasn't

15:33:12 1 even talked about the news at issue, that's even
15:33:15 2 further afield, so there are examples existing out
15:33:15 3 here, which I think also should be precluded --

15:33:27 4 THE COURT: Let me back up on something.

15:33:29 5 MR. LIOLOS: Yes, sir.

15:33:30 6 THE COURT: I mean, there are instances
15:33:31 7 that I've seen in the record where something is
15:33:35 8 clearly an opinion. And, I mean, there's no disputing
15:33:42 9 if he's, in my opinion X. That's going to be clearly
15:33:48 10 opinion.

15:33:49 11 Now, an expert can't say, well, I think
15:33:53 12 that's an opinion. We don't need an expert to say
15:33:56 13 that. It says it's in my opinion. But they can rely
15:34:02 14 on that as being an opinion.

15:34:08 15 So, now, if they say, you know, the wall
15:34:14 16 is brown, well, that's getting more in the gray area
15:34:16 17 of whether that's an opinion or a declarative
15:34:18 18 statement.

15:34:19 19 MR. LIOLOS: And I think the concern here
15:34:21 20 is that the testimony related to, oh, that's
15:34:30 21 Mr. Matlock's opinion, they're purporting to have the
15:34:32 22 expert come in and say, well, his opinion is clearly
15:34:34 23 based on all of this other market activity that's
15:34:36 24 going on in the background. And that's an
15:34:40 25 impermissible link that has no foundation.

15:34:42 1 So to the extent that those examples don't
15:34:44 2 have any foundation, I don't know that --

15:34:44 3 THE COURT: The problem, I guess is what
15:34:45 4 I'm pointing out to you, that -- I mean, we're looking
15:34:50 5 at this in the context of a motion in limine. And
15:34:51 6 what I'm going to have to look at it is in the context
15:34:53 7 of whatever question is being asked.

15:34:58 8 So unless -- until I know what the --
15:35:01 9 what it pertains to, I can't really rule on it as a
15:35:04 10 motion in limine.

15:35:07 11 MR. LIOLOS: Understood. It's difficult
15:35:09 12 lines to draw in the abstract.

15:35:11 13 I think the key points are -- I think Your
15:35:13 14 Honor's tracking though. It just has to be tethered
15:35:16 15 in some way to the defendant. And there has to be a
15:35:18 16 foundational basis for the expert to testify to that
15:35:23 17 as it's relevant to what we're talking about here.

15:35:27 18 Again, 4 is back to the victim blaming
15:35:30 19 point.

15:35:36 20 5 goes to follower counts over time and
15:35:39 21 the causation issue; whether there's, you know, 5,000
15:35:41 22 or 125,000. And they want to opine that, you know,
15:35:46 23 whether a tweet is directed at 5,000 people, it
15:35:51 24 couldn't have influenced the marketplace in the
15:35:55 25 abstract. We're going to hear from people who did

15:36:01 1 read and respond to the tweets.

15:36:03 2 THE COURT: Well, I think this is the flip
15:36:05 3 side of one we've already granted, and that is
15:36:06 4 Mr. Williams's motion that, you know, no one, at least
15:36:11 5 that we've heard of so far, is equipped to opine
15:36:15 6 whether a certain tweet affected one person or 100,000
15:36:19 7 people.

15:36:21 8 MR. LIOLOS: I would agree with you.

15:36:23 9 THE COURT: I mean, it affects both sides
15:36:24 10 both ways. You can't say -- you know, the government
15:36:26 11 can't say that, well, you have 500,000 followers, so
15:36:30 12 500,000 people were misled. On the flip side, you
15:36:36 13 can't say, well, no one reads this, so no one was
15:36:39 14 misled. I mean, it's -- you know, it's almost a good
15:36:42 15 for the goose, good for the gander rule.

15:36:44 16 MR. LIOLOS: Absolutely, Judge. Thank
15:36:44 17 you.

15:36:46 18 And I do think -- I mean, we assumed at
15:36:50 19 the outset of this discussion that, you know, he was
15:36:51 20 qualified to provide all of this information. But
15:36:54 21 being certified in the field of data forensics, that's
15:36:57 22 a long leap between these sorts of arguments that
15:37:00 23 we're talking about.

15:37:07 24 And he wants to present also a lot of
15:37:09 25 cumulative fact testimony that is in Ms. Garibotti's

15:37:14 1 charts, which I understand there's not a huge dispute
15:37:17 2 over the math of it. So to the extent that he's going
15:37:21 3 to, you know, talk about charts or fact testimony that
15:37:26 4 really isn't in dispute because it's shown on the
15:37:29 5 charts, I would -- that's 403, but we can address that
15:37:31 6 as it comes in.

15:37:33 7 Does Your Honor have anything else on
15:37:35 8 Mr. Hughes or should we turn to Mr. Marks?

15:37:40 9 THE COURT: Let's go to Mr. Marks.

15:37:42 10 MR. LIOLOS: Okay. So, again, point 1
15:37:43 11 here is the first point we were talking about and
15:37:47 12 disclosure requirements, rules governing market
15:37:51 13 participants in general; you know, what's going on in
15:37:53 14 the regulated securities industry, brokers, all that
15:37:56 15 sort of stuff.

15:37:57 16 I mean, it just doesn't have any relevance
15:38:00 17 to the defendants in this case. I don't know why
15:38:02 18 we're talking about it, other than to trot out all
15:38:06 19 these rules in front of the jury and say, hey, my guys
15:38:09 20 doesn't violate any of these things that don't apply
15:38:11 21 them, so they couldn't have done what they're charged
15:38:14 22 with. I mean, there's just -- it has no relevance and
15:38:15 23 there's no reason to waste anybody's time with that.

15:38:18 24 Point 2 is the day trading topics that we
15:38:23 25 were talking about. So they want to back-door in an

15:38:29 1 ultimate issue and say that, essentially, Mr. Matlock
15:38:31 2 was day trading and slip in "day trading" instead of
15:38:35 3 "legal."

15:38:36 4 THE COURT: See I'm missing the point on
15:38:38 5 that. I mean, I'm missing why you're upset about it
15:38:43 6 and I'm missing why the defendants want it.

15:38:46 7 MR. LIOLOS: Because they want to lay
15:38:47 8 out -- they want to basically describe Mr. Matlock's
15:38:50 9 trading as day trading and say, oh, look this is what
15:38:55 10 I just described, it's legal. It's an ultimate issue
15:38:57 11 conclusion that's coming in.

15:39:02 12 THE COURT: Well, day trading itself is
15:39:04 13 legal. And what these individuals were doing I think
15:39:10 14 everybody concedes was day trading, wasn't it? I
15:39:13 15 mean, is there any argument about that?

15:39:16 16 MR. LIOLOS: But a witness shouldn't talk
15:39:18 17 about what is or is not legal. I mean, that's your
15:39:20 18 job --

15:39:20 19 THE COURT: Well, I agree with that. But
15:39:23 20 he can say, you know, is there any regulation or any
15:39:28 21 securities thing that says you can't be a day trader.
15:39:34 22 No. I mean, that's kind of borderline, but --

15:39:37 23 MR. LIOLOS: But to then compare and say,
15:39:40 24 oh, this is day trading, this is --

15:39:40 25 THE COURT: But I don't think he can

15:39:42 1 say -- I'm not going to let him or anybody else say --
15:39:45 2 look at a transaction and say, this transaction was
15:39:47 3 legal, this one wasn't legal.

15:39:49 4 MR. LIOLOS: So I think they just want to
15:39:50 5 use --

15:39:51 6 THE COURT: That's what the jury is going
15:39:53 7 to decide.

15:39:54 8 MR. LIOLOS: I'm tracking with you. I
15:39:55 9 think basically the thrust of this is, instead of
15:39:57 10 using the word "legal," he's just going to say day
15:40:00 11 trading and I've already defined that as legal, so
15:40:00 12 when I call it day trading, I'm just calling it legal.
15:40:06 13 Legal, legal. And it's a 704 --

15:40:06 14 THE COURT: But you're going to get up on
15:40:08 15 cross-examination and say, is it legal to lie to these
15:40:10 16 people.

15:40:10 17 MR. LIOLOS: Again, I just think that the
15:40:12 18 witness -- the expert shouldn't be coming in and
15:40:14 19 talking about what is or's not legal.

15:40:20 20 THE COURT: Well, I'm not going to let him
15:40:22 21 opine on the law, even though he's a law professor.

15:40:22 22 MR. LIOLOS: Okay. Thank you, Judge.

15:40:28 23 THE COURT: You open that door, we'll
15:40:29 24 never get that door shut. But he certainly -- I mean,
15:40:38 25 and I don't want to say this pejoratively. But I

15:40:43 1 can't see why we're wasting time -- I can see why you
15:40:47 2 don't want him to say, I've looked at everything
15:40:51 3 Mr. Matlock did and everything Mr. Matlock did was
15:40:53 4 legal. Okay. And I'm not going to let him do that.

15:40:58 5 You know, but why are we worried about
15:41:03 6 whether day trading is legal or not? Because it is
15:41:06 7 legal.

15:41:07 8 MR. LIOLOS: Because if he's defining it
15:41:09 9 as legal and then saying everything I've seen
15:41:11 10 Mr. Matlock doing is day trading, that's a back-door
15:41:15 11 704 --

15:41:16 12 THE COURT: You guys -- and I know what
15:41:19 13 you're trying to say and I agree with you. Okay. But
15:41:22 14 in the long scheme of things, you guys aren't actually
15:41:26 15 complaining about the trades. You're complaining
15:41:30 16 about what they told the public about the trades.

15:41:33 17 MR. LIOLOS: Indeed. And by giving it the
15:41:36 18 imprimatur of it being day trading, that's inserting a
15:41:39 19 comment on the fraudulent intent.

15:41:42 20 THE COURT: But your own witness is going
15:41:44 21 to admit it's day trading, isn't she? I mean, how
15:41:50 22 could -- she did all these charts with trades like
15:41:52 23 five second apart.

15:41:53 24 MR. LIOLOS: I think that the issue here
15:41:54 25 is the concept of day trading being legal or illegal

15:41:58 1 is a way to back-door in the legal conclusion, right.
15:42:00 2 I don't know that she's even going to talk about the
15:42:02 3 concept of day trading. I'm not sure.

15:42:08 4 THE COURT: Well, I mean, the whole
15:42:08 5 point is -- now, I might agree with you on a relevance
15:42:11 6 argument that -- unless somebody claims day trading is
15:42:15 7 illegal, it's not relevant because it is legal. You
15:42:19 8 know, there shouldn't be a fight about it.

15:42:26 9 But I guess -- and I understand your
15:42:26 10 point. And I agree with your point about not
15:42:28 11 testifying that a certain act that the defendants
15:42:32 12 accused of was a legal act or it was illegal. I'm not
15:42:37 13 going to let him testify to that.

15:42:38 14 But I guess -- I have to hear the
15:42:42 15 question, I guess, about -- that you're worried about
15:42:45 16 before I can say whether I grant an objection to it or
15:42:48 17 not. Because, I mean, he certainly -- if -- let me
15:42:58 18 back into it maybe.

15:43:00 19 If the defendants in this case had done
15:43:06 20 everything they did and profited just like they did,
15:43:11 21 or didn't do, depending on how well they did it, but
15:43:17 22 hadn't said a word on the internet, they wouldn't have
15:43:19 23 been prosecuted.

15:43:21 24 I mean, am I missing something?

15:43:23 25 MR. LIOLOS: Nope. You hit the nail on

15:43:25 1 the head.

15:43:27 2 THE COURT: Okay. Well, so the actual
15:43:28 3 trading part of it was totally legal. Even on your
15:43:32 4 side of the fence.

15:43:35 5 MR. LIOLOS: It's hard to divorce the
15:43:37 6 trading from the statements, but I hear what Your
15:43:39 7 Honor is saying.

15:43:40 8 THE COURT: Yeah. Now it's what they said
15:43:42 9 about the trades, either before or after, that
15:43:47 10 concerns y'all that they misled all these people.

15:43:50 11 MR. LIOLOS: And I hear what you're
15:43:51 12 saying, is we can cross him on it. But I'm just
15:43:53 13 concerned about the imprimatur of saying they're
15:43:56 14 just --

15:43:57 15 THE COURT: Well, I'm granting your motion
15:43:59 16 to the extent that I'm not going to allow anybody to
15:44:01 17 say, was one of these acts legal or illegal? But
15:44:13 18 that's as close as I can get until I hear a question.

15:44:16 19 MR. LIOLOS: Understood, Judge. Thank
15:44:16 20 you.

15:44:18 21 Are we on number 3? That's the victim
15:44:21 22 blaming point again. You know, they want to go
15:44:26 23 through all these points where Mr. Matlock said trade
15:44:29 24 your own plan. And maybe people didn't, you know,
15:44:32 25 execute as well as they should have.

15:44:34 1 I mean, it's, again, trying to disclaim
15:44:35 2 away liability for the fraud. It's not legally
15:44:38 3 relevant because the victim's negligence or stupidity
15:44:42 4 doesn't explain away the fraud. That's right in the
15:44:46 5 Fifth Circuit --

15:44:47 6 THE COURT: Well, it might be relevant,
15:44:48 7 though, of the defendants' intent to commit fraud. I
15:44:52 8 mean, so I'm not granting that again until I hear the
15:44:55 9 question and what it's addressed to, because it may be
15:44:58 10 relevant on some other issue. That has nothing to do
15:45:02 11 with what the victims did or didn't do. It's what the
15:45:05 12 victims -- the alleged victims were told.

15:45:09 13 MR. LIOLOS: Fair enough. And we would
15:45:10 14 preserve hearsay objections and all sorts of things
15:45:13 15 for those.

15:45:13 16 THE COURT: Well, absolutely. I'm not
15:45:14 17 ruling on that.

15:45:18 18 MR. LIOLOS: Fair enough.

15:45:19 19 So, again, number 4 here is traditional
15:45:21 20 market manipulation versus the actions in question in
15:45:24 21 this matter is how they defined it. I mean, that's
15:45:28 22 the novelty of the charges that we were discussing
15:45:29 23 earlier. It's a way to back-door in the concept that,
15:45:34 24 you know, this is a novel set of charges and all sorts
15:45:37 25 of things of that matter, in terms of legally

15:45:42 1 irrelevant stuff to the jury's question, which is:
15:45:45 2 Whether the defendants did or didn't do what they've
15:45:48 3 been charged with.

15:45:51 4 You know, that's not helpful to them in
15:45:51 5 determining --

15:45:52 6 THE COURT: Well, I'm not granting that.
15:45:57 7 Obviously, he's not going to testify until after your
15:45:59 8 expert testifies. And, you know, if your expert
15:46:06 9 testifies that -- well, this is a unique pump and dump
15:46:08 10 scheme, I think their expert ought to be able to say,
15:46:13 11 yeah, it's unique. It's never happened before.

15:46:18 12 MR. LIOLOS: Understood.

15:46:23 13 So number 5 goes to, you know, publicly
15:46:25 14 available trade news and its affect on stocks. This
15:46:29 15 is, again, just an effort to talk about all the
15:46:33 16 free-floating stuff that was going on on the internet,
15:46:36 17 without any foundation or connection to the
15:46:38 18 defendants' conduct or victim or the things that are
15:46:41 19 at issue here in terms of their intent.

15:46:48 20 To the extent that something was just
15:46:49 21 floating around on the internet and no -- there's no
15:46:50 22 evidence that anyone saw, it just has no relevance to
15:46:53 23 what we're talking about.

15:46:54 24 THE COURT: Okay. And we'll have to take
15:46:55 25 that on a question-by-question basis, because some of

15:46:58 1 it was tethered to tweets. I mean, some of it -- the
15:47:07 2 tweets talk about stuff that's happening out in the
15:47:09 3 public.

15:47:10 4 MR. LIOLOS: And I think that is a fair
15:47:11 5 line to draw on the issue.

15:47:14 6 THE COURT: But I'm not allowing him to,
15:47:17 7 you know, make up that everything got traded this way
15:47:21 8 because Hamas invaded Israel or something.

15:47:30 9 MR. LIOLOS: Thank you, Judge.

15:47:31 10 6 deals with the FINRA records. I don't
15:47:32 11 know if Your Honor wants to table that until we talk
15:47:36 12 about them. But he wants to talk about FINRA's
15:47:39 13 investigation --

15:47:40 14 THE COURT: Let's table that.

15:47:42 15 MR. LIOLOS: Number 7 is testimony about
15:47:43 16 the COVID market of 2020 and 2021. Again, you know,
15:47:48 17 this is far afield. I don't know what it's tethered
15:47:52 18 to. It's general market commentary, observation about
15:47:58 19 the influx of volume into the markets during this time
15:48:00 20 and the remarkable rise in markets overall.

15:48:04 21 You know, this is not a historical door of
15:48:07 22 how COVID impacted the stock markets. We've defined
15:48:10 23 this to 54 tickers and time periods. You know, I
15:48:16 24 think it's confusing to go far afield.

15:48:21 25 THE COURT: Well, let me say this on that:

15:48:24 1 I mean, you guys are going to present -- by "you guys"
15:48:28 2 I mean, the government -- is going to present a --
15:48:31 3 some background in your part of the case.

15:48:37 4 As a general background into this, the
15:48:43 5 fact that a lot of people are at home living on their
15:48:47 6 computers because of COVID and doing the kind of
15:48:52 7 trading that was being done. I mean, while it may not
15:48:59 8 be relevant to the charges, I mean, the jury has to
15:49:02 9 have some context.

15:49:07 10 I mean, I don't know -- I mean, you guys
15:49:09 11 have been living with this. I've just been looking at
15:49:12 12 evidence here in the last couple of weeks. And I'm
15:49:16 13 amazed of how many people are doing this so frequently
15:49:21 14 like this, and they're talking to each other while
15:49:23 15 they're doing it.

15:49:25 16 And so I think both sides need to consider
15:49:30 17 there has to be a little context to explain this to
15:49:33 18 the jury, because if we don't have a day trader on the
15:49:42 19 jury -- and I'm probably guessing we're not -- they're
15:49:43 20 not going to know how this works.

15:49:46 21 And it's -- I don't know who will
15:49:49 22 ultimately benefit, but I think both sides are going
15:49:51 23 to need to have some context here, because the
15:49:53 24 government, you're going to try to say to the jury
15:49:55 25 that's why these texts and -- are so important.

15:50:02 1 Because these people live and die on what they see on
15:50:04 2 their computer and phones. They weren't texts.
15:50:09 3 Tweets, whatever they are.

15:50:10 4 And the defense is going to say this is a
15:50:15 5 culture. You don't realize that these people live
15:50:17 6 online on their computers.

15:50:21 7 And so I don't want it to get far afield,
15:50:25 8 believe me. I'm going to rein it in some. But
15:50:28 9 there's got to be some background here or the jury's
15:50:32 10 not going to understand it.

15:50:32 11 MR. LIOLOS: Understood and agreed, Judge.
15:50:33 12 I think the concern here -- there has to be some sort
15:50:35 13 of context. The concern here is just getting far
15:50:37 14 afield down, oh, there's a bunch of meme stocks, you
15:50:40 15 know, my client was trading GME, Game Stop, all those
15:50:46 16 other things that aren't in the 54 and sort of a way
15:50:48 17 to back-door in all of that other good conduct,
15:50:50 18 quote/unquote. So that's sort of the line we're
15:50:53 19 trying to draw here.

15:50:54 20 THE COURT: That gets us to Mr. Auslander.

15:50:58 21 MR. LIOLOS: Again, I mean, it's the same
15:51:01 22 steam, different day, right. Talking about how the
15:51:04 23 defendants weren't registered, licensed, you know, not
15:51:08 24 covered by all these other FINRA and SEC regulations
15:51:13 25 that rule practices, strategies, indices standards for

15:51:17 1 institutional investors -- I mean, I don't know why
15:51:19 2 we're talking about institutional investors.

15:51:22 3 Commodities trading, I mean, I don't think
15:51:24 4 there's any allegations of commodities trading. You
15:51:30 5 know, it's not improper or illegal for retail traders
15:51:34 6 to use social media to publicize or tout stocks.
15:51:35 7 They're talking about the legally and illegality of
15:51:38 8 all sorts of behavior.

15:51:41 9 You know, take your pick here.

15:51:43 10 THE COURT: Again, this is going to have
15:51:44 11 to be judged on how the question is phrased. And,
15:51:57 12 quite frankly, by this point in time, what the
15:52:01 13 government's witnesses have already testified to.

15:52:12 14 MR. LIOLOS: Yeah, I think that's fair,
15:52:12 15 Judge.

15:52:12 16 I would say I don't know why an
15:52:14 17 institutional investor discussion would take place in
15:52:16 18 this case, because nobody's alleged to be an
15:52:18 19 intuitional investor. But fair enough to defer to the
15:52:21 20 questioning.

15:52:25 21 And then Mr. Evans here, I think it was
15:52:29 22 just a woefully deficient disclosure. It's been a
15:52:32 23 while since I've looking at this, but there's all this
15:52:36 24 proffered testimony about his examination and analysis
15:52:38 25 of various stock price movements, high frequency

15:52:47 1 trading data, Twitter and Discord communications
15:52:49 2 associated with multiple stocks listed in the
15:52:51 3 superseding indictment, including the substantive
15:52:53 4 counts. But it doesn't offer what those opinions are,
15:52:57 5 what the reasons and bases therefore are. I think
15:53:00 6 it's just deficient disclosure.

15:53:02 7 And I think I heard Your Honor earlier
15:53:04 8 saying that to the extent that something hasn't been
15:53:07 9 disclosed, it's not going to be testified about. And
15:53:09 10 what's good for the goose is good for the gander.

15:53:14 11 THE COURT: And I agree with that still.

15:53:18 12 MR. LIOLOS: So to the extent -- I mean,
15:53:19 13 obviously we can address this as the testimony arises,
15:53:21 14 but to the extent it hasn't been disclosed, you know,
15:53:27 15 I don't think it should be --

15:53:29 16 THE COURT: All right. And to that extent
15:53:31 17 with regard to Mr. Evans, I'll grant the motion in
15:53:34 18 limine to the extent that anything he purports to
15:53:36 19 testify has not been disclosed.

15:53:42 20 MR. LIOLOS: Thank you, Judge.

15:53:42 21 MR. ROSEN: Judge, can I address two quick
15:53:46 22 points with regards to their last points about the
15:53:49 23 experts?

15:53:49 24 THE COURT: Yes.

15:53:50 25 MR. ROSEN: They are our experts.

15:53:56 1 Day trading. Which it's all that they
15:54:00 2 want precluded, because their own expert is trying to
15:54:03 3 define it in their disclosures.

15:54:05 4 But the point is this: My client was a
15:54:09 5 day trader. What the government is saying is that
15:54:11 6 simply tweeting positive stuff about a stock means you
15:54:14 7 shouldn't have sold. The whole ethos of day trading
15:54:19 8 is that as the stock goes up, you slowly scale out of
15:54:22 9 your position to lock in profits.

15:54:24 10 It's not inconsistent with having a
15:54:26 11 positive view of a stock. In fact, it's completely
15:54:30 12 consistent, while also selling off parts of your
15:54:31 13 position. We're going to have a witness come and
15:54:34 14 testify that as the stock goes up, he would sell off
15:54:37 15 about 75 percent of his position and keep 25 percent
15:54:40 16 of it in case the stock really shot up as part of sort
15:54:44 17 of a going-to-the-moon-type scenario. That's
15:54:46 18 completely consistent with day trading.

15:54:49 19 And, more importantly, it goes to my
15:54:51 20 client's intent to cheat and intent to defraud.
15:54:53 21 That's exactly why we need it. We're not arguing
15:54:55 22 whether it's legal or illegal. It doesn't matter.
15:54:58 23 What matters is his state of mind, my client's, in
15:55:01 24 selling. And that's why we need it.

15:55:04 25 The second thing is that, you know,

15:55:09 1 they're arguing that certain regulations are not
15:55:12 2 important or simply not applicable here. That's
15:55:15 3 wrong.

15:55:16 4 The government has created what is --
15:55:18 5 appears to be a new crime: Simply people getting
15:55:21 6 together, talking about stocks and trading the same
15:55:25 7 stocks. They're all buying together. And the
15:55:27 8 government -- that's part of their scheme that they've
15:55:29 9 charged. And they've even deemed it front-loading.

15:55:34 10 The only point we're making is that that's
15:55:35 11 not illegal. That's not a scheme. If you -- the SEC
15:55:40 12 has very carefully defined regulations. If you own
15:55:43 13 more than 5 percent, you have to disclose. You're
15:55:47 14 insider or director, you have to disclose.

15:55:48 15 There is nothing preventing them from
15:55:51 16 getting together, trading ideas, and purchasing the
15:55:55 17 same stocks, as long as they don't go above the
15:55:57 18 disclosure rules. That's all we want to show to
15:56:00 19 combat the government's narrative that this
15:56:02 20 front-loading is somehow nefarious.

15:56:06 21 I mean, they've created this term
15:56:07 22 "front-loading," as if purchasing a stock before
15:56:09 23 publicly commenting it and disclosing your position is
15:56:12 24 wrong or illegal. It's certainly not.

15:56:19 25 Finally, they've -- I don't know --

15:56:20 1 understand the basis for their objections to
15:56:22 2 Mr. Evans. Mr. Evans has created hundreds of pages of
15:56:25 3 charts regarding the stock price movements of the
15:56:27 4 stocks at issue. We've disclosed tick data, we've
15:56:30 5 disclosed trading data.

15:56:31 6 He's test -- his opinions -- first of all,
15:56:34 7 most of it's not opinion. It's simply here is what
15:56:37 8 happened in the minutes after a tweet, or the minutes
15:56:39 9 before a tweet.

15:56:40 10 This is why -- you know, he's not going to
15:56:44 11 say, this is why a sale occurred. He's going to say,
15:56:46 12 okay, there was a tweet here or there was a price
15:56:49 13 movement here.

15:56:50 14 The government and the defense have very
15:56:52 15 different views of this case. The government views
15:56:53 16 this as static. You know, a tweet, ten minutes later
15:56:57 17 a sale, aha, there must have been something nefarious.

15:57:01 18 What they don't understand is second by
15:57:02 19 second, minute by minute, the stock can radically
15:57:05 20 change. We just heard about that earlier today. GTT
15:57:09 21 exploded. It went up 30 percent in 15 minutes.
15:57:13 22 Nothing to do with our guys.

15:57:14 23 Obviously people are going to take profits
15:57:16 24 off the table and sell. It doesn't mean what they
15:57:18 25 said before was a lie or not. It simply provides

15:57:22 1 context for what's going on.

15:57:23 2 The government wants us to be -- have no
15:57:25 3 context. They want the jury to hear about this static
15:57:27 4 timeline where stocks don't move up and down, they
15:57:30 5 simply stay level throughout the day until there's a
15:57:33 6 tweet. And that's flat-out false and it's wrong. And
15:57:35 7 it goes to -- directly, again, to intent and to
15:57:39 8 materiality.

15:57:41 9 MR. ARMSTRONG: Your Honor, I mean, I
15:57:44 10 think Mr. Rosen has the trifecta for things that are
15:57:46 11 being said that are going to be flatly contradicted by
15:57:48 12 the record.

15:57:49 13 If we can pull up Government's
15:57:51 14 Exhibit 115, please.

15:58:27 15 Anyway, the point of the Government's
15:58:28 16 Exhibit 115 is that Mr. Rosen is claiming that we have
15:58:30 17 created this term "front-load." It's in the
15:58:33 18 government exhibit in a conversation with Mr. Matlock.
15:58:36 19 So I don't know where he's getting that from.

15:58:38 20 But the whole thrust of what he's trying
15:58:41 21 to say is that he wants to argue the novelty of this
15:58:44 22 case, which I think Your Honor has already excluded.

15:58:47 23 Now, just because SEC has not published a
15:58:49 24 rule about this, this is a novel case, that the jury
15:58:51 25 should not be able to convict on because who can

15:58:53 1 figure it out. I think Your Honor gets why that's
15:58:55 2 improper.

15:58:57 3 THE COURT: Okay. All right. Are there
15:59:04 4 any other motions in limine -- I think I've covered
15:59:07 5 them all that aren't tied to a particular exhibit.

15:59:28 6 Let's talk about the FINRA documents. And
15:59:29 7 it's -- the government has a motion in limine to keep
15:59:30 8 the FINRA documents out just as a general category.

15:59:38 9 Who wants to address that, Mr. Liolos?

15:59:40 10 MR. LIOLOS: Thank you, Judge.

15:59:46 11 This dovetails with the last point in that
15:59:50 12 the investigations, the conclusions, what have you of
15:59:56 13 civil regulators -- I mean, FINRA is not even a part
15:59:59 14 of the federal government, right. It's a private
16:00:01 15 entity that's funded by its members and it's a
16:00:04 16 self-regulatory entity, like the Bar Association.

16:00:07 17 What they're looking at under different
16:00:13 18 standards, under civil laws, and under different
16:00:17 19 jurisdictions, just doesn't have anything to do with
16:00:20 20 the legal questions that the jury is going to be asked
16:00:23 21 to decide about whether the defendants did or didn't
16:00:25 22 do something.

16:00:32 23 And the best evidence of that is the
16:00:33 24 defendants' own actions, the defendants' own social
16:00:35 25 media activity, and all the facts that will bring to

16:00:38 1 bear on this case; bringing in the conclusions baked
16:00:40 2 into documents, not even a live witness, of what they
16:00:44 3 did or didn't conclude, looking at, frankly, who knows
16:00:47 4 what in terms of the scope of their investigation,
16:00:49 5 looked at different facts potentially, the Sonar
16:00:54 6 records themselves, there's no indication on the face
16:00:57 7 of them at all that they looked at the defendants'
16:00:58 8 social media activity, that they looked at the
16:01:00 9 defendants' trading. Who knows exactly what they
16:01:03 10 looked at until you talk to every single person who
16:01:05 11 did the investigation.

16:01:06 12 It just doesn't have any relevance to the
16:01:09 13 points that the jury is going to be asked to decide
16:01:11 14 here. They were looking at different things under
16:01:13 15 different standards. And there is no point in getting
16:01:16 16 into mini-trial after mini-trial about what FINRA did
16:01:20 17 or didn't do in each one of these investigations.

16:01:26 18 MR. FORD: Your Honor, if I may?

16:01:27 19 Let me just start by saying we don't plan
16:01:31 20 to and we don't think any of these documents should be
16:01:33 21 introduced into evidence or seen by the jury.

16:01:36 22 The reason I sought them was because the
16:01:39 23 government had made the claim in their indictment that
16:01:42 24 that my client was artificially inflating stock
16:01:45 25 prices.

16:01:46 1 And I continue to believe that in the
16:01:48 2 possession of the SEC and FINRA, which is a
16:01:52 3 quasi-regulatory agency under the auspices of the SEC,
16:01:55 4 that there are documents in their possession showing
16:01:57 5 that there were other actors in the market who were
16:02:01 6 engaged in that conduct, actual pump and dumps.

16:02:05 7 I feel highly confident, based on some of
16:02:08 8 the recent SEC complaints, both administrative and in
16:02:13 9 Federal Court, that they have those documents. That's
16:02:15 10 what I was seeking.

16:02:16 11 The government failed to turn it over. It
16:02:18 12 goes to the causation element. To the extent we get a
16:02:21 13 ruling that they're not permitted to say that any of
16:02:25 14 these individuals caused the price or volume to move,
16:02:28 15 then I would have to concede that they did not -- I
16:02:31 16 mean, they didn't need to turn them over.

16:02:34 17 There's still a question as to whether
16:02:36 18 it's a *Brady* violation. But as far as admissibility,
16:02:38 19 we were the ones who sought them. We never had
16:02:41 20 intended to introduce this into evidence, FINRA's
16:02:45 21 conclusion or the SEC's. And, frankly, we don't think
16:02:48 22 they should ever be shown to the jury.

16:02:50 23 MR. LIOLOS: They're on their exhibit
16:02:52 24 list. So forgive me if we were mistaken.

16:02:54 25 THE COURT: I didn't hear you.

16:02:55 1 MR. LIOLOS: The SEC report and a number
16:02:59 2 of the Sonar docs, I think are on their exhibit list,
16:02:59 3 so --

16:03:01 4 MR. FORD: Not on ours.

16:03:01 5 MR. LIOLOS: The SEC report is.

16:03:03 6 MR. FORD: We will not be seeking to
16:03:05 7 introduce the SEC report, Your Honor.

16:03:07 8 THE COURT: All right. You want to add to
16:03:07 9 this?

16:03:08 10 MR. ROSEN: Sure.

16:03:12 11 Some of the FINRA documents, particularly
16:03:15 12 with the Sonar system, are on our exhibit list. We
16:03:19 13 haven't yet decided exactly whether -- if we're going
16:03:23 14 to seek admission of all of them or some of them.
16:03:25 15 We've done that out of an abundance of caution.

16:03:27 16 Point being very simply: This is a
16:03:29 17 securities fraud case. They're alleging a series of
16:03:31 18 pump and dumps. They have a computer -- FINRA has a
16:03:34 19 computer system that detects whether there's market
16:03:37 20 manipulation, unusual volume, unusual demand, or
16:03:41 21 social media promotions. And they determined in many
16:03:46 22 of these that there hadn't been.

16:03:48 23 And so I think that's very critical
16:03:50 24 evidence. And I can't -- you know, I guess the only
16:03:55 25 issue is whether they're business records or not.

16:03:57 1 We're not going to belabor the point. And we had a
16:04:00 2 deposition where the -- where he -- you know, the
16:04:01 3 witness met the elements of business record. That's
16:04:05 4 it. We're not going to be -- we're not going to say
16:04:08 5 nothing occurred. We're saying this particular
16:04:10 6 computer system did not defect what the government
16:04:13 7 claims was at issue. That's all.

16:04:17 8 MR. LIOLOS: Your Honor, that's not what's
16:04:18 9 in the report. It's not simply that the computer did
16:04:20 10 or didn't defect what's at issue. The reports
16:04:23 11 encompass the investigation and the conclusions of the
16:04:27 12 FINRA investigator who looked at whatever was going on
16:04:31 13 when the report dinged, right.

16:04:33 14 And we walked through at the last hearing
16:04:36 15 the other records that they want to keep out, when
16:04:39 16 Your Honor said if any of the FINRA stuff is coming
16:04:42 17 in, it's coming in together.

16:04:43 18 The two reports where they actually looked
16:04:44 19 at the defendants' conduct and actually looked at
16:04:47 20 their social media activity, they concluded that
16:04:50 21 something has gone on here, I need to refer to the SEC
16:04:52 22 because it's beyond our jurisdictional limit.

16:04:54 23 So point 1, we don't think any of this is
16:04:57 24 relevant because it's civil standards. Civil
16:05:00 25 investigation.

16:05:00 1 But point 2, if any of it comes in, it's
16:05:04 2 all species of the same genus, it should all come in.

16:05:10 3 MR. ROSEN: The lengthy investigative
16:05:11 4 reports prepared a year and a half or two years after
16:05:13 5 the events in question are, by definition, not
16:05:17 6 business records. They're prepared rarely, not
16:05:20 7 frequently. You know, once every month, once every
16:05:24 8 two months. They're surmising what happened based on
16:05:28 9 very little information. And they're completely
16:05:31 10 unreliable, and -- but, more importantly, they're
16:05:34 11 just not --

16:05:34 12 THE COURT: So their FINRA reports are
16:05:37 13 unreliable, but yours aren't.

16:05:40 14 MR. ROSEN: Because they're completely
16:05:41 15 different. They're completely different.

16:05:42 16 The first are very quick snapshots of
16:05:44 17 trading activity in the market, where they're, okay,
16:05:47 18 this happened yesterday. Here is our quick review of
16:05:49 19 it and we didn't see any evidence of market
16:05:51 20 manipulation or anything like that.

16:05:53 21 THE COURT: Well, why wouldn't the FINRA
16:05:56 22 records a year later, when they actually went and
16:05:57 23 studied it, be more reliable?

16:05:59 24 MR. ROSEN: They're completely unreliable.
16:06:01 25 What we actually walked -- we walked the witness

16:06:03 1 through various conclusions that FINRA made, and they
16:06:07 2 were linking together counterparties that had nothing
16:06:09 3 to do with each other.

16:06:10 4 They were saying -- you know, they were
16:06:12 5 saying that our guys had something to do with the
16:06:15 6 management of a particular stock.

16:06:16 7 You know, I -- you know, if you're going
16:06:19 8 to allow, you know, all records in, we'll withdraw
16:06:22 9 ours. But I do think ours are relevant. It's an
16:06:26 10 apples-and-oranges comparison. I'm happy to show you.

16:06:29 11 But just because one set of records is a
16:06:31 12 business record does not mean lengthy investigative
16:06:34 13 reports, prepared without proper -- you know, looking
16:06:37 14 at -- at, you know, social media activity and
16:06:41 15 connections are valid. It's just a different thing.

16:06:43 16 THE COURT: Well, I have to say that I
16:06:45 17 think Mr. Ford's point is probably well taken. That
16:06:48 18 if the government is not claiming that manipulated the
16:06:52 19 price, that they're then irrelevant.

16:07:00 20 MR. ROSEN: Okay.

16:07:01 21 THE COURT: And if the government -- and
16:07:01 22 that's more or less what I heard Mr. Armstrong say
16:07:05 23 this morning, that they're not going to try to claim
16:07:08 24 that the -- they pumped up the price. That there were
16:07:13 25 other factors in it, but they were just going to hang

16:07:19 1 their hats on the fact that they allegedly lied about
16:07:26 2 not selling when they were selling, things of that
16:07:30 3 nature.

16:07:32 4 MR. ROSEN: Could I offer a compromise?

16:07:36 5 THE COURT: Sure.

16:07:37 6 MR. ROSEN: Could we hold them in reserve?
16:07:38 7 They have a FINRA witness testifying. Could we hold
16:07:41 8 them in reserve. If we need them on cross, we'll
16:07:44 9 raise it for you --

16:07:45 10 THE COURT: Well, outside the presence of
16:07:47 11 the jury.

16:07:47 12 MR. ROSEN: Outside presence of the jury.

16:07:48 13 THE COURT: It will simplify tomorrow if
16:07:51 14 we just -- we'll put FINRA on hold.

16:07:51 15 MR. ROSEN: Fine.

16:07:53 16 THE COURT: All right.

16:07:53 17 MR. LIOLOS: Your Honor, could I just
16:07:54 18 correct one thing real quick?

16:07:54 19 THE COURT: Yeah.

16:07:55 20 MR. LIOLOS: Mr. Rosen has a deposition
16:07:57 21 transcript in which we walked through under oath the
16:07:59 22 business record questions. And they applied to both
16:08:02 23 documents. The only difference between the two sets
16:08:04 24 is that FINRA spent more time doing the full
16:08:07 25 investigation and looked at more stuff.

16:08:10 1 THE COURT: Yeah. I'll have to say
16:08:14 2 just -- not as an advisory opinion, but just as a
16:08:17 3 matter of construction that, you know, it's going to
16:08:21 4 be hard for me to admit part of the FINRA documents
16:08:24 5 but not all of them.

16:08:27 6 All right. Here's where -- I'm going to
16:08:30 7 break for today. Tomorrow we're going to start
16:08:36 8 actually admitting documents. There is one -- no pun
16:08:44 9 intended -- intrinsic problem with that. And that's
16:08:48 10 intrinsic versus extrinsic. And what's part of a
16:08:52 11 conspiracy.

16:08:53 12 So that's going to be -- necessarily be
16:08:54 13 part of what we're talking about tomorrow. But I want
16:08:56 14 to get as far in -- I'd like to admit -- I mean, if we
16:08:59 15 could get done with every parties' documents, that's
16:09:03 16 my goal, but clients don't have to be here. If
16:09:08 17 they -- you know, obviously they're free to be here if
16:09:10 18 they want to.

16:09:13 19 If you're not involved in the documents,
16:09:16 20 lawyers don't have to be here. But I need the lawyers
16:09:20 21 that know the most about the documents and whoever is
16:09:24 22 here needs to have the authority to speak for their
16:09:27 23 party.

16:09:31 24 I can promise you it will be a long, but
16:09:35 25 boring day. See you tomorrow. Let's say 9:30. I've

16:09:41 1 got some criminal stuff I'm doing in the morning. So
16:09:45 2 let's start about 9:30.

16:09:49 3 MR. FLEITES: Does Your Honor perceive
16:09:52 4 wrapping up the pretrial tomorrow?

16:09:55 5 THE COURT: I think that would be wishful
16:09:57 6 thinking on my part.

7
8 (Court in recess.)
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CERTIFICATE

I hereby certify that pursuant to Title 28, Section 753 United States Code, the foregoing is a true and correct transcript of the stenographically reported proceedings in the above matter.

Certified on March 20, 2024.

/s/ Nichole Forrest
Nichole Forrest, RDR, CRR, CRC

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